88-1320

No. .....

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALAN GREGORY M.L.V. WONDERWHEEL
and JOHN R. WEBER,

Petitioners,

v.

VELDA G. BRADY, ARTHUR
L. BECKTOLD and
JOSEPH BECKTOLD

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION ONE

JAMES REYER
Post Office Box 5876
Santa Rosa, California 95402
(707) 527-2668

Counsel for Petitioner

170 pp

QUESTIONS PRESENTED

1. Did the state trial court abandon its judicial duty by uncritical acceptance without change of a decision prepared by the attorney for the prevailing party, in a case decided solely on the credibility of witnesses?

2. Did the state court of appeal abandon its judicial duty by limiting its scope of review and defering to the trial court for findings of fact in reviewing a decision prepared by the attorney for the prevailing party and uncritically accepted without change by the trial court, in a case decided solely on the credibility of witnesses?

3. When does an arbitrary and capricious state trial court decision indicate an abandonment of judicial duty after uncritical acceptance without change by the trial court of a decision prepared by the attorney for the prevailing party, in a case decided solely on the credibility of witnesses?

4. What are the constitutional procedural standards under the Due Process Clause of the 14th Amendment to prevent abandonment of judicial process after uncritical acceptance without change by a trial court of a decision prepared by the attorney for the prevailing party, in a case decided solely on the credibility of witnesses?

5. When does the uncertainty of state law standards for the factual and legal content of state trial court decisions invite the abandonment of judicial duty and unconstitutionally deny litigants an independent judicial decision through the uncritical acceptance without change of a decision prepared by the attorney for the prevailing party, in a case decided solely on the credibility of witnesses?

6. When does the uncertainty of state law standards for the factual and legal content of state trial court decisions unconstitutionally deny litigants notice of the workings of the trial court judge's mind for the purpose of appeal of the trial court decision?

PARTIES

The parties to this proceeding are Alan Gregory M.L.V. Wonderwheel and John R. Weber and Velda G. Brady, Arthur L. Becktold and Joseph Becktold.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ALAN GREGORY M.L.V. WONDERWHEEL
and JOHN R. WEBER,

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v.

VELDA G. BRADY, ARTHUR L. BECKTOLD,
and JOSEPH BECKTOLD.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION ONE

Petitioners Alan Gregory M.L.V. Wonderwheel and John R. Weber respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate

District, Division One, entered in this proceeding on August 17, 1988.

OPINIONS BELOW

The decision of the court of appeal, which is not published in official reports, is set out at pp. A64-A94 of the Appendix. The order denying rehearing by the court of appeal, which is not reported, is set out at p. A95. The order denying review by the Supreme Court of California, which is not reported, is set out at p. A96. The statement of decision signed by the judge of the superior court on September 9, 1986, which is not reported, is set out at pp. A4- A57 of the Appendix.

JURISDICTION

The judgment of the court of appeal was entered on August 17, 1988. A timely petition for rehearing was filed, which was denied on September 16,, 1988.

A timely petition for review by the Supreme Court of the State of California was filed, which was denied on November 9, 1988. Jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1) 28 U.S.C. Section 2403(b) may be applicable in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 52(a), Federal Rules of Civil Procedure, provides in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

California Code of Civil Procedure, Section 632, in effect at the time of the trial court decision in this case, provides in pertinent part:

> In superior, municipal, and justice courts, upon trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for

> its decision as to each of the principal controverted issues at trial upon the request of any party appearing at trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested such a statement, any party may make proposals as to the content of the statement of decision.

California Code of Civil Procedure, Section 632, prior to amendment in 1981, read in pertinent part:

> In superior, municipal, and justice courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required, except as herein provided.
>
> In superior courts, upon such trial, the court shall announce its intended decision. Within the time after such announcement permitted by rules of the Judicial Council, any party appearing at the trial may request findings.

> Unless findings are requested, the court shall not be required to make written findings and conclusions.

California Rules of Court, Rule for Superior Court 232, in effect prior to the 1981 amendment that changed Section 632 to its condition at the time of the trial court decision in this case, provided in pertinent part:

> (e) [Form of findings] Findings shall fairly disclose the court's determination of all issues of fact material to the judgment in the case and shall be concisely and chronologically stated whenever practicable. Findings shall not refer merely to the truth or falsity of allegations contained in the pleadings.

STATEMENT OF THE CASE

A. The Nature of the Case.

This case concerns a state trial court decision prepared by the attorney for the prevailing party and uncritically accepted without change by the signature of the trial court judge (the

"Decision"). The Decision is based solely on the credibility of two (2) witnesses, who were the plaintiffs in the matter before the court. They were the sole witnesses in support of their position and presented no evidence at the trial, other than their oral testimony, to support the central issues of payment of consideration that arose at trial. A third plaintiff did not present herself for testimony at the trial. Petitioners presented their own oral testimony as well as oral testimony of a non-litigant. They produced documentary evidence in support of their oral testimony on the central issues of payment of consideration.

The Decision concludes that Petitioners provided no consideration and thereby committed fraud in deed transactions between partners, and that conclusion is central to the judgment

partitioning the real property that is the subject of the litigation. The Decision is considerably different than the tentative decision issued by the trial judge. The tentative decision itself recites a conclusion of fraud by one of Petitioners in the preparation of a deed that is nowhere mentioned in the trial record.

A careful comparison of facts adduced from the trial record with statements made in the Decision on critical issues at trial is disquieting. The discursive techniques offered in the preparation of the Decision deflect the reader's attention from, or actually obscure, the more difficult factual issues, credibility problems, and even the application of otherwise elementary legal principles presented by this case. The disparity between the facts in the trial record and the statements and

conclusions reporting them in the Decision prepared by the attorney for the prevailing party necessitates detailed citations to the trial record in this Petition. 1/

B. The Trial Proceedings

The transactions at trial covered a period of thirteen (13) years, commencing in 1972. In 1972 Petitioners, along with Joseph Becktold and other partners who were no longer involved at the time of this litigation, purchased 40 acres of real property in the County of Mendocino, California. At that time, Joseph Becktold designated Velda G. Brady (his aunt) as owner of record for his

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1/ The citation "RT" herein refers to the Reporter's Transcript of the trial on February 20, 1986 and May 28, 1986. The citation "CT" refers to the Clerk's Transcript and includes pleadings and documents filed with the clerk of the trial court in this case. Page numbers follow the "RT" or "CT" designation and, where applicable, line numbers follow the colon after the appropriate page number.

interest in the property. The thirteen (13) -year period ended in 1985 when an action was filed against Petitioners by Velda G. Brady ("Brady") on May 24 of that year in Superior Court of the State of California, County of Mendocino, seeking partition of the land. It is undisputed that during this entire thirteen (13) -year period Petitioners never knew of the existence of Joseph's brother, Arthur Becktold.[2/] It is undisputed that Brady (the aunt of Arthur as well as Joseph Becktold) never knew that Arthur had any connection (if in fact he did) with the land or monies used in relation to it.[3/] Josepn Becktold

2/ RT 23:6-21, 131:14 to 132:22, 140:14-18, 191:25 to 192:6, CT 158:7-21.

3/ RT 23:6-21, 24:7-9,137:10 to 138:17, 139:4-7, 140:25-28.

represented to both Petioners and Brady that he was the defacto owner of his interest.[4/] It is undisputed that Joseph Becktold never told his partners about Arthur's existence or informed his aunt, as owner of record for his partnership interest, that Arthur was supplying him with money for payments on the land.[5/]

Petitioners in their answer, filed on June 24, 1985, asserted the affirmative defenses that Joseph Becktold was the real party in interest, that Joseph Becktold, acting for himself or as agent for Brady agreed to a pre-emptive right agreement and that because of such agreement, Joseph Becktold was estopped from obtaining judicial partition of the real property in question.

4/ RT 75:1-8, 137:22-27,140:14-18.

5/ See notes 2 and 3.

The case was heard by a judge without a jury on February 20, 1986 and more than three months later on May 28, 1986. A tentative decision was issued by the trial court on July 9, 1986 awarding Arthur L. Becktold one-half (1/2) of the property and Petitioner Wonderwheel one-half (1/2) of the property. Petitioners requested, on July 21, 1986, from the trial court a statement of decision under California Code of Civil Procedure, Section 632.

The record does not show the date of the initial submission of the Decision. The record does show, however, that the Decision was prepared by Timothy O. Stoen ("Stoen"),the attorney for the prevailing parties.[6/] The Decision was

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6/ Stoen's name, address, telephone number and disignation as "Attorney for Plaintiffs" are typed at the top left-hand corner of the
(Footnote continued on next page.)

submitted to the attorney for Petitioners sometime between the July 21 request date and August 22, 1986, when Petitioners requested a hearing on the Decision (at that time called the "Amended Proposed Statement of Decision"). Petitioners at the time of the hearing request also filed objections that the factual and legal bases as to issues 1, 2, 3, 7, 8, 9 and 10 did not accurately reflect the evidence on each such issue presented at trial and were not in conformity with the trial court's tentative decision. Petitioners also observed that issues 11, 12 and 13 did not accurately reflect the evidence on those issues presented at trial. The request for a hearing was granted, and a hearing was scheduled to

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(Footnote continued from previous page.)
Decision, and Petitioners referred to the "amended proposed statement of decision submitted to the Court by Plaintiffs" in their objections filed on August 22. (CT 124:15-16, 141:1-5,

Appendix p. A4)

be heard on September 5, 1986.

The record shows that in a memorandum in opposition to Petitioners' objections to the Decision, dated September 4, 1986,[7/] Stoen, as the attorney for the prevailing plaintiffs, and the author of the Decision, in the same argumentative style contained in the Decision, argued for the credibility of his clients' naked testimony and against the credibility of Petitioners' testimony (which had supporting extrinsic evidence and third-party supporting testimony of a former partner in the early period of land ownership). This memorandum employs the same discriminatory standard and method of conclusionary statement, without presentation of facts and without the delineation of rational lines of

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7/ CT 132-138.

thought between stated legal principles and factual context, that is employed in the Decision.

The record shows no transcript of the hearing scheduled for September 5 and shows no recitations in later record documents that the hearing took place. The record does show, however, that the Decision was signed by the trial court signature on September 9, 1986. There was one change, however, in the Decision before it was signed: the word "proposed" in the title "amended proposed statement of decision" was lined out. The use of the term "amended" in the title of the Decision should not be confused with the amending of the Decision after the scheduled hearing, but is an apparent reference to the amending of the proposed statement of decision submitted by Stoen on July 18, 1986 before Petitioners, on July 21 and

supplementally on July 25, requested from the trial court a statement of decision on the specified controverted issues referred to in the Decision.

The Decision states that "ARTHUR L. BECKTOLD ("ARTHUR" [sic]) is the owner of an undivided three-fourths (3/4) interest, and that GREGORY M.L.V. WONDERWHEEL ("WONDERWHEEL") and JOHN R. WEBER ("WEBER") are the owners of the remaining one-fourth (1/4)."[8/] The tentative decision had stated that "ARTHUR L. BECKTOLD owns one half of the property and GREGORY WONDERWHEEL owns one half."[9/]

The tentative decision also stated that

> "deeds made by Brady to Wonderwheel and Weber were obtained by fraud and no

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8/ CT 142:15-18; Appendix p.A6.

9/ CT 113:13-14; Appendix p.A3.

> consideration was paid. For example, Weber was on welfare when he claimed to have made payments for which he had no receipts." 10/

This statement about Weber's being on welfare as it relates to his presumed inability to provide consideration for the deed for which he was grantee has no support in the record and is an example of the trial court in its tentative decision picking up on a zealously repeated conclusory statement of Stoen which has no basis in the record. 11/

10/ CT 113:9-12;Appendix p. A2-A3. Petitioner Weber testified that Joseph Becktold took his records and did not return them. RT 114:8-11. Joseph Becktold testified he did not take Weber's receipts. RT 205:10-12. Though no one other than Joseph Becktold ever discussed the property with Arthur Becktold (RT 23:6-21, 25:24-25, 132:19-22,192:3-6), Arthur testified he had seen the receipt for "twenty-one hundred". RT 52:16-26. This receipt was one of Weber's missing receipts. Exhibit G.; RT 183:4-14.

11/ RT 209:13-17. There is nothing in the record to support this assertion. See RT 116:4-16 for Weber's sources of income. Weber testified he received welfare assistance for two (2) unspecified years of the thirteen (13) years in question. RT 114:2-7, 115:17-24.

Likewise, there is no evidence in the record that there ever was a deed from Brady to Wonderwheel.

The method of preparation and the depth of fact finding and legal analysis in the Decision prepared by the attorney for the prevailing parties and accepted without change by the signature of the trial court, is reflected in the response of the Decision to Issue Eleven and Issue Twelve, the two (2) critical issues in this case: "Whether there was any fraud regarding deeds made by Brady to Wonderwheel and Weber" and "Whether there was any consideration paid for the deed made by Brady to Wonderwheel and Weber":

"ELEVENTH ISSUE

> 11. The eleventh issue raised is: 'Whether there was any fraud regarding deeds made by Brady to Wonderwheel and Weber.'
>
> With regard to this issue, the court's decision is that fraud was committed regarding both deeds.

a. The court based its decision on the following facts: the facts as set forth under the previous issues herein, particularly the first issue.

b. The legal basis for the court's decision is as follows: The same legal basis set forth under the previous issues herein, particularly the first issue, including the court's determination that the evidence shows that all of the elements of fraud have been met with respect to each deed. 'The elements of fraud are (1) misrepresenation...; (2) knowledge of falsity...; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.' Witkin, Summary of California Law (8th Ed.), p.2711.

With respect to the ANNE KAYLOR deed dated June 30, 1977,[12/] the evidence showed that (1) by preparing said deed giving himself a one-half (1/2) of ANNE KAYLOR'S interest, GREGORY WONDERWHEEL thereby represented that he had paid and would pay one-half (1/2) of the consideration for said interest, i.e., one-half of

12/ It is important to state here that this is not responsive to the Eleventh Issue, i.e., a deed from Brady to Wonderwheel. The existence of such a deed appears nowhere in the record.

$6,500; [13] (2) by not paying any consideration to ANNE KAYLOR directly and by not paying reimbursement to VELDA G. BRADY as reimbursement, WONDERWHEEL knew he had not paid for that interest and never intended to do so; [14] (3) by inducing ANNE KAYLOR'S signature on the deed, and by not paying consideration to nor disclosing the deed to VELDA G. BRADY or JOSEPH BECKTOLD, [15] WONDERWHEEL intended to defraud; (4) by virtue of WONDERWHEEL'S ongoing position

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13/ The record shows the consideration was $4,500. Anne Kaylor testified she sold the property for $4,500. Exhibit 3, RT 89:6-19, 195:23-28, 196:1-4. The $6,500 consideration claim comes only from contradictory testimony from the Becktolds. Joseph testified "Arthur said" [Kaylor was] "$2,000 in the whole; Arthur testified he knew of "$2,000 in arrears" because "Joey told me." RT 13:3-5. See also RT 120:12-19, 144:17-19.

14/ This statement is a variation of the illogic that a duty to act proves the act itself. It assumes that the alleged existance of an act proves the intent to commit that act, and it is particularly suspect when the alleged existence of the act is based solely on the credibility of witnesses who are plaintiffs in the litigation.

15/ The deed was disclosed. It states on its face: "AND WHEN RECORDED MAIL TO VELDA G. BRADY" with her address. Exhibit 3.

as fiduciary,[16] the reliance on his preparing the deed was justifiable; and (5) by losing one-fourth (1/4) interest in the property, plaintiffs suffered substantial damage.

With respect to the deed to JOHN R. WEBER dated June 12, 1979, the evidence showed that (1) by making a promise to pay VELDA G. BRADY[17] consideration for a one-sixth (1/6) interest in the property, JOHN R. WEBER made a material representation of his present state of mind and intention to pay; (2) by not intending to keep said promise at the time he made

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16/ The basis for this fiduciary relationship is not established by a coherent statement of fact or application of legal standard. The fiduciary responsibility of Joseph Becktold to Gregory Wonderwheel and the 13-year deception by Joseph Becktold of his partners and his aunt Velda Brady and the implications of that deception of them are never confronted or explained in the Decision.

17/ The record shows a promise by Weber to pay Joseph Becktold directly and to make land payments for him; no promise to Brady. RT 167:23 to 171:26, 179:22 to 181:7, 181:25 to 184:11, 196:5 to 197:2; Exhibit B. Plaintiff Joseph Becktold's testimony denies any promise to any one and answers, "I don't remember" when asked who authorized Brady to sign the deed and why. RT 145:26 to 147:14.

it and by never paying the consideration, JOHN R. WEBER had knowledge of the falsity of his [18/] representation; (3) by making said promise for the purpose of inducing VELDA G. BRADY'S signature on the deed, JOHN R. WEBER had an intent to defraud and to induce reliance on his [19/] misrepresentation; (4) by virtue of acquaintance with JOHN R. WEBER for seven years and his interest in the property for said time, the reliance on JOHN R. WEBER'S interest to perform was [20/] justifiable; and (5) by losing a one-sixth (1/6) interest in the property by said deed, plaintiffs suffered substantial damage.

TWELFTH ISSUE

12. The twelfth issue raised is: 'Whether there was any consideration paid for the deed made by Brady to Wonderwheel and Weber.'

18/ See note 14.

19/ See note 14.

20/ The only testimony regarding why Brady signed the deed came from Petitioners who stated that she signed because the promise to pay Joseph and the noteholder had been fulfilled. See notes 14 and 17.

> With regard to this issue, the court's decision is that no consideration was provided.
>
> a. The court based its decision on the same facts as previously set forth herein.
>
> b. The legal basis for the court's decision is the same as previously set forth herein."

The Decision on these two (2) most critical issues in the case makes cross-references to other issues in the Decision. Petitioners are not given in a carefully laid out factual presentation notice of the factual context of their purported moral turpitude. They are asked in the Decision to search elsewhere in the Decision and piece together their own factual context to divine the thought process in the Decision's grasp toward a conclusion of lack of consideration and perpetration of fraud.

Related to the obfuscation of these issues, the attorney for the prevailing parties states, in the

Decision authored by him and signed without change by the trial court, that "It is undisputed that Velda G. Brady paid (with Arthur Becktold's funds) all of the $4500."[21] The record shows, however, that the source of funds Brady used to make this payment was clearly and heavily disputed by Petitioner Wonderwheel.[22] There is no dispute, however, in the record that Brady did not use her own funds.[23] There is no dispute in the record that on all other occasions where there is evidence of Brady's writing checks, Brady made payments from pooled contributions of both Petitioners and plaintiff Joseph Becktold, who Petitioners' thought was their partner and who had represented to

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21/ CT 147:16-17; Appendix p. A6.

22/ RT 91-96, 168-170.

23/ RT 96:16-19, 138:3-8, 191:25-28, 192:1-2.

them, as well as to Brady, that he was supplying his own contributions.[24/] It is important to note here that plaintiff Brady did not present herself for testimony at the trial.

There is no dispute in the record that for the entire thirteen (13) years, from the purchase of the real property at issue in 1972 until after this litigation began in 1985, plaintiff Joseph Becktold never told Petitioners, his partners, of the existence of Arthur L. Becktold.[25/] It is also undisputed in the record that during that same thirteen (13) year period, Joseph Becktold did not tell his aunt Velda G. Brady that Arthur L. Becktold (also Brady's nephew) was involved in the real property at issue

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24/ RT 73:27 to 75:8, 132:15-18, 138:23-25, 160:26 to 161:23.

25/ RT 131:14-22, 132:6-22, 140:14-18, CT 158:7-21.

and supplying him moneys therefor.[26] Arthur Becktold, himself, testified that he actively and deliberately kept his involvement secret, and that he instructed Joseph Becktold to misinform his attorney, and thereby the trial court, of his involvement in this case at the outset of this litigation.[27]

The misstatements of fact, shift of presumptions and burdens of proof, circular arguments, and speculative inferences appearing as statements of conclusion, which are contained in the Decision prepared by the attorney for the prevailing party which was uncritically accepted without change by the signature of the trial court judge, create a formidable task for Petitioners to

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26/ RT 137:10 to 139:7, 140:25-28.

27/ RT 48:26 to 50:10.

dispell the illusion that no matter how many of these misstatements, speculative inferences, and circular arguments are disproved by Petitioners, there will still be some remaining which will support a decision in favor of Stoen's clients.

This disquieting disparity between the factual integrity of the record and central statements of fact and inferences contained in the Decision evidences a clear pattern of rewriting, avoidance and suppression of material facts in the record and the use of false logic, cliches, circular arguments and thought terminating phrases to reach critical conlusions stated therein. These methods are familiar tactics of practitioners of cult mind control. The purpose of these psychological techniques is to capture the vehicles of thought and communication in order to impose a partisan doctrine

over a balanced view of reality.[28/] Petitioners request that this Court in that regard take judicial notice of[29/] Stoen's role as attorney for and close association with the Reverend Jim Jones in the governing of the People's Temple located in Mendocino County, and elsewhere.[30/]

28/

See Delgado, Richard, "Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment," 51:1 Southern California Law Review 1, 67-69 and notes 64 and 66 at 13(1977); and see Lifton, R. Thought Reform and the Psychology of Totalism: A Study of Brainwashing in China (1961).

29/

See 9 Wigmore, Evidence section 2571 (Tillers Rev. 1983), Muller v. Oregon, 208 U.S. 412 (1908), Quong Wing v. Kirkendall, 223 U.S. 59 (1912) and Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937).

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See Report of Staff Investigative Group to the Committee on Foreign Affairs, U.S. House of Representatives, The Assassination of Representative Leo J. Ryan and the Jonestown, Guyana Tragedy (1979), at pp. 311, 324, 325, 327, 335, 336, 469, 470; and see Reiterman, Tim (with John Jacobs) Raven: The Untold Story of Rev. Jim Jones and His People (1982), at pp. 108-109, 111-113, 125-131, 153-154, 175, 211-213, 232, 270, 292, 334, 339, 351, 378, 408.

The Decision is replete with misstatements of fact when closely compared to testimony and documentary extrinsic evidence contained in the record. These misstatements include a statement concerning a central issue that certain facts are uncontradicted when they are in fact disputed in the trial record,[31] that certain facts exist that are not even mentioned in the record,[32] and the representation of Stoen's client's testimony as a statement of fact when it is contradicted by the same witness elsewhere in the trial transcript, by his plaintiff brother's testimony or by official government records.[33]

31/ CT 145:7-9, 147:16-17;Appendix pp. A11-A12, A16. See text at notes 21 and 22, p. 24, above.

32/ See note 11.

33/ See note 10; CT 145:7-9; Exhibit E.

These techniques of misstatement include the editing of uncontradicted testimony in order to brand the testimony of witnesses and supporting extrinsic evidence favorable to Petitioners as unreliable,[34/] using unsupported statements of conclusion to avoid the examination of testimony as to fact,[35/] and even include the statement that the mere existence of a legal duty proves the performance of that duty.[36/]

The Decision also equates out of context the thirteen (13)-year deception and non-disclosure to Petitioners of Arthur L. Becktold's alleged involvement with the property[37/] with Petitioner Weber's non-disclosure as an owner of

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34/ CT 144:17-23, 145:19-22; Appendix pp. A10-A12.

35/ CT 156:3-12; Appendix p. A32.

36/ CT 151:7-11; Appendix p. A23.

37/ See note 2.

record (even though all partners knew of Weber's participation)[38], in order to trivialize the significance of Arthur's and Joseph's thirteen (13)-year deception of Petitioners.

This case requires a careful examination and cross-comparison of the record to reveal the underlying deceptions which can be seen by the reader when comparing the trial record with the Decision prepared by the prevailing party attorney and uncritically accepted without change by the signature of the trial court. The state court of appeal apparently did not engage in such a careful review of the record and accepted into its decision in important instances Stoen's

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38/ CT 158:1-4; Appendix p. A36; Exhibit B; RT 101:23 to 102:14, 143:12-21, 190:9-27.

mischaracterization of the testimony and extrinsic evidence located in that record.[39/]

C. The Appellate Proceedings

Petitioners filed a notice of appeal of the Decision to the court of appeal on December 29, 1986 and in that appeal Petitioner Wonderwheel, a non-lawyer, represented Petitioners, In Pro Per. On August 17, 1988, the court of appeal affirmed the Decision authored by the prevailing party attorney and, in so

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39/ The appellate decision found the attorney authored Decision to be "a thorough twenty-nine page statement" of findings. Appendix p. A77.

doing, presumed that the Decision was a decision of the trial court rather than Stoen,[40] presumed that all factual matters were to be viewed most favorably to Stoen's clients,[41] limited its scope of review to a determination of substantial evidence,[42] and assumed that all issues of credibility were within the province of the trial court.[43]

Petitioners filed a petition for rehearing with the court of appeal on August 31, 1988. Petitioners asserted that the appellate court decision misapprehended the underlying facts in the trial court record, that misconduct in misapplying the law and misstating the facts in the Decision by the prevailing

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40/ Appellate decision p. 17; Appendix p. A93.

41/ Appellate decision p. 8; Appendix p. A78.

42/ Appellate decision p. 9; Appendix p.A77, A78.

43/ Appellate decision p. 9; Appendix p. A78.

party attorney denied Petitioners a fair trial, that deference by the court of appeal to the Decision authored by the prevailing party attorney denied Petitioners their rights to an independent judicial decision and notice of findings of fact and conclusions of law under the Due Process Clause of the 14th Amendment, and that the misapplication by the appellate court of a state law single witness substantiality test for credibility denied Petitioners their right to equal protection of the laws under the 14th Amendment. Petitioner Wonderwheel again represented Petitioners, In Pro Per, in this petition for rehearing. The court of appeal rejected the petition for rehearing on September 16,1988.

Petitioners filed with the Supreme Court of the State of California on September 26, 1988 a petition for review

of the state appellate court decision. This petition for review was denied on November 9, 1988.

REASONS FOR GRANTING THE WRIT

(1) Certiorari Should Be Granted to Review the State Trial Court Practice of Uncritical Acceptance of Decisions Prepared by the Attorney for the Prevailing Party, Particularly in a Case Decided Solely on the Credibility of Witnesses

The Decision at the trial level in this case is an object lesson in the problems that arise when a trial court uncritically accepts by its signature without change a decision prepared by the attorney for the prevailing party. This is particularly true when the case under consideration is decided solely on the credibility of witnesses and the witnesses believed are the clients of the author of the decision. The potential

for abuses in the context of the prevailing attorney as author was most recently recognized by this Court in Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985), and concern for this practice was first expressed by this Court a quarter century ago in United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964). This Court has criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when the findings take the form of conclusory statements unsupported by citation to the record, and has acknowledged the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their client's favor. Anderson v. City of Bessemer City, North Carolina, supra, 470 U.S., at 572.

The trial judge in making an independent decision must deal with questions of fact and law involved in the course of reasoning through which he or she has reached his or her ultimate decision in the case, even though that reasoning is tentative and has not been set down in writing. The preparation by the attorney for a prevailing party of findings and conclusions without any knowledge of the fact finding and reasoning processes through which the judge has already gone undermines the purposes of an independent judicial decision: 1) the formulation and articulation by the trial judge of his or her findings of fact and conclusions of law through the judge's independent consideration of the case; and 2) the evocation of care in his or her own personal decision making process. See Roberts v. Ross, 344 F2d 747, 751 (1965)

and 9 Wright & Miller, Federal Practice and Procedure 1971), Civil, Section 2571, esp. notes 6, 7 and 8. The evocation of care in ascertaining facts is an inherent part of the judicial function and the judge cannot surrender that function to an attorney for one of the litigants. See 9 Wright & Miller, ibid., Section 2578, note 15. This Court has recognized its right to reverse findings of fact by a trial court where those findings are "clearly erroneous":

> The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. [note omitted] A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)

This appellate power to review the character and integrity of findings and conclusions adopted by the trial court in an attorney authored decision to ensure the performance of independent judicial duty as articulated under Rule 52(a) in Roberts v. Ross has been ascending as a critical issue of constitutional procedural Due Process.

Mr. Justice Blackmun, then sitting as a Circuit Judge, acknowledged the relationship of attorney authored decisions to the integrity of the record and the abandonment of judicial process as an issue of constitutional due process dimension in Bradley v. Maryland Casualty Company, 382 F. 2d 415, 423 (1967):

> In a recent antitrust case the Supreme court had occasion to note and comment on this practice. It is apparent that the Court did not approve the practice but it concluded that such findings 'though not the product of the workings of the district judge's mind are formally his; they are not to be rejected out-of-hand,

> and they will stand if supported by evidence'. United States v. El Paso Natural Gas Co., 376, U.S. 651, 656, 84 S.Ct. 1044, 1047 12 L.Ed.2d 12 (1964).
>
> We apply this test to the findings and conclusions adopted by the district court in this case. When we do so, the present findings and conclusions, as were those in the El Paso case, are clearly supported by the evidence and are not vulnerable. They are drawn carefully, in detail, and in a professional manner, and they relate specifically to evidence in the record. This is not a situation where the findings and conclusions are not the product of the court's own careful consideration of the evidence, of the witnesses, and of the entire case. We see no abandonment of the judicial process and certainly nothing which approaches the level of a deprival of constitutional due process. The findings and conclusions, accordingly, are entitled to their usual weight. [citations omitted]

This court continued the recognition of the fundamental principle that the Due Process Clause entitles a person to an impartial and disinterested tribunal in civil cases and makes clear that the requirement of neutrality in

adjudicative proceedings safeguards two (2) central concerns of procedural due process: (1) the prevention of unjustified or mistaken deprivations, and (2) the promotion of participation and dialogue by affected individuals in the decision making process. Marshall v. Jerrico, Inc., 446 U.S. 238,244 1980. The neutrality requirement was central in Marshall to the guaranty that life, liberty or property will not be taken on the erroneous or distorted conception of facts or law. See also Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

A trial court decision prepared by the prevailing party's attorney after the announcement of a tentative decision, does not serve the central function of neutrality inherent in an independent judicial decision, even though it is signed by a judge. This practice provides the judge with an opportunity to

reconsider the bases of his or her original decision at the time of such signature without affording the non-prevailing party information as to the original bases of the decision or information of the change in balance between those bases in any such reconsideration by the judge.

A second abuse inherent in such uncritical acceptance without change of a decision authored by the attorney for the prevailing party is that such practice may easily result in a finding of error at the appellate level because the decision does not support the trial judge's decision or because the decision is loaded down with argumentative over-detailed partisan matter much of which is likely to be of doubtful validity or wholly without support in the record. Roberts v. Ross, supra, 344 F.2d, at 752.

The third abuse, however, is the most serious and strikes at the heart of constitutional government. With the presence of an impartial and independent judicial tribunal, constitutionally harmful lapses from the integrity of the record by a zealous advocate may be blunted. When, by the uncritical signature of a trial court judge, the zealous advocate is permitted to unbridle his zeal into that court's decision without the restraint of the scruples of the record, the independent judicial tribunal has vanished; neutrality has vanished.

This case is an object lesson of all three of the above abuses. The worst fears of Roberts v. Ross and Bradley v. Maryland Casualty Company have been realized.

(2) Certiorari Should Be Granted to Review the State Appellate Court Practice of Limiting Its Scope of Review of State

Trial Court Decisions that are Prepared by the Attorney for the Prevailing Party and Uncritically Accepted Without Change by the Trial Court, Particularly in a Case Decided Solely on the Credibility of Witnesses

The state court of appeal decision in this case is an object lesson in the problems that arise when an appellate court assumes that a trial court decision prepared by the attorney for the prevailing party and uncritically accepted without change by the trial court's signature is an independent judicial decision of that trial court. These problems result when the appellate court does not take responsibility for ensuring that the statements of facts included in an attorney authored decision reflect the factual integrity of the record. The appellate court in this case limited its scope of review even though Petitioners raised objections to the absense of factual support, thinness of

legal analysis in the Decision and lack of conformity with the tentative decision every step of the way. In so limiting its scope of review and assuming an independent judicial decision, the appellate court in effect delegated its own authority to the attorney for the prevailing party. This license enabled the attorney author to definitively establish credibility decisions for the trial court, to "edit" the trial transcript to avoid and suppress important testimony and critical extrinsic evidentiary support for the legal positions relied on by Petitioners, and having done so, to conclude that Petitioners possessed the intention to commit fraud, as well as to make critical subsidiary decisions to that conclusion.

This disregard for fundamental fairness would warrant summary reversal by this Court even if it were an isolated

incident and the sole basis for decision. Strict requirements of neutrality require the judge, not a prosecutor (or in this case the attorney for the opposing litigant), to make the final decision and thereby preserve impartiality which serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional framework. Marshall v. Jerrico, supra, 446 U.S., at 242.

This Court has strongly endorsed the neutrality requirement and clarified its role as a reviewing appellate tribunal in protecting that neutrality in the face of attorney authored decisions. In Anderson this Court rejected the argument that the trial court had adopted the proposed findings of Anderson's attorney, and determined, after careful review of the record, that the findings that the trial court ultimately issued varied considerably in organization and

content from those submitted by the prevailing attorney. Anderson v. City of Bessemer City, North Carolina, supra, 470 U.S., at 574.

This Court charged itself, in Anderson, with a standard of appellate review to carefully review the record to establish a level of reasonableness before authorizing deference to the fact finding powers of the trial tribunal. This gauge of reasonableness is an important restraint by this Court, as an appellate tribunal in attorney authored decisions, on the impulse of a trial tribunal to surrender its independent judicial duty on questions of credibility to a persistent and zealous attorney for a prevailing party.

The Anderson opinion under this Court was issued in a setting of appellate court review of a trial court decision and the symbiotic relationship

between those tribunals in ensuring the integrity of the trial record under Rule 52(a). The function of fairness and independence under Rule 52(a) in ensuring such trial record integrity is a central feature in evidencing the reality of an impartial and neutral tribunal under the Due Process Clause in Marshall. In its turn, the preservation of trial record integrity in the face of impulses to surrender it to zealous forces that would create their own visions of partisan reality under the guise of judicial authority is as constitutionally compelling for state courts under the Due Process Clause of the 14th Amendment as it is constitutionally compelling for federal courts under the Due Process Clause of the 5th Amendment.

(3) Certiorari Should Be Granted to Review a State Trial Court Decision to Determine When An Arbitrary and Capricious Decision Becomes Abandonment of Judicial Duty After

Uncritical Acceptance Without Change by the Signature of a State Trial Court Judge of a Decision Prepared by the Attorney for the Prevailing Party

A careful review of the record in this case by this Court using the Anderson analysis to review the trial court decision imposed on Petitioners will reveal that the state trial court decision would be set aside under the clearly erroneous standard. This standard was recognized in United States Gypsum Co., supra, at 395 (1948) as having its source in equity jurisprudence and has been applied generously to attorney author decisions under 52(a). The same equity value has its counterpart in the arbitrary and capricious standard under the Due Process Clause of the 14th Amendment. Postal Telegraph Cable Co. v. City of Newport, Ky., 247 U.S. 464 (1918. See also Tracy v. Ginzberg, 205 U.S. 170 (1907), and Patterson v. Colorado Ex Rel.

Atty Gen., 205 U.S. 459, 464-465 (1906) (Justice Harlan dissenting) and Gryger v. Burke, 334 U.S. 728, 732-736 (1947) (Justices Rutledge, Black, Douglas and Murphy dissenting).

The relation of a state judge to the Constitution of the United States under Article VI of that Constitution mandates a clear constitutional framework of Due Process standards for ensuring that judge's place in an independent and neutral state judiciary, and is as constitutionally significant as the place of a federal judge in an independent and neutral federal judiciary. The limits of judicial discretion in delegating the exercise of judicial authority to forces outside the judiciary through an easy and convenient signature given to an eager and partisan attorney waiting in the outer office should not be protected by the legal fiction that the decision, even

though prepared by a partisan attorney, is really the conscious decision of the judge. The Constitution and the Due Process Clauses of the 5th and the 14th Amendments deserve better, as do the Petitioners in this case.

(4) Certiorari Should Be Granted to Review a State Statute that Invites Abandonment of Judicial Duty to the Attorney for the Prevailing Party and Thereby Denies Petitioners an Independent Judicial Decision and Notice of Findings of Fact and Conclusions of Law to Facillitate Review on Appeal of a Decision Based Solely on the Credibility of Witnesses

The requirement of written findings of fact and conclusions of law for judicial decisions in civil cases in the State of California was eliminated and replaced by a more casual and less exacting standard by an amendment adopted in 1981.[44/] The amendment that replaced

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44/ 16A West's Ann. Cal. C.C.P., Section 632.

the requirement of written findings of fact and conclusions of law for superior courts, such as the trial court in this case, had as its purpose the reduction of court and attorney time and the reduction of post-trial hearings.[45/]

Rule of Court 232(e), that was also eliminated as a consequence of that action, required before the change brought about by the 1981 amendment that findings fairly disclose the trial court's determination on all issues of fact material to the judgment in the case and be concisely and chronologically stated wherever practicable.[46/] A further requirement eliminated in 1981 was the requirement that findings not refer

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45/ California Assembly Committee on Judiciary, Bill Digest, AB 1684, Hearing Date May 13, 1981; and California Senate Committee on Judiciary, Courts: Findings and Conclusions. AB 1684 (Undated).

46/ 23, Pt 1 West's Ann. Cal.C.C.R, Rule 232(e).

merely to the truth or falsity of allegations contained in the pleadings.[47/]

The softer standard under the post-1981 state law for trial court decisions entitled the trial court in this case to issue a statement of decision explaining "the factual and legal basis for its decision as to each of the principal controverted issues at trial."[48/] There was no accompanying restraint in the post-1981 Rule 232 that provided limits of acceptability on factual and legal bases for a statement of decision under the new law.[49/]

This case is an object lesson of the abuses that can result when a state

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47/ See note 46.

48/ See note 44.

49/ See note 46, see also Judicial Council of California, Memorandum on Ammendment of Rules to Conform to Legislation Eliminating Written Findings, dated October 28, 1981.

law is changed from specific standards to indefinite standards in guiding the content of judicial determinations of facts and conclusions of law.

Where the judge has a personal interest in the outcome of litigation before the trial court, the neutrality of the trial court is put into question. See Tumey v. Ohio, 273, U.S. 510 (1927) and Ward v. Village of Monroeville, 409 U.S. 57. Lackadaisical state law standards governing content in decisions undermine responsibility of the judge in the exercise of judicial authority and soften the incentive for judges to preserve neutrality. Strict requirements of neutrality require the judge to assert his or her judicial power in a neutral and independent manner. The contours of judicial discretion, inside that duty to exercise judicial power independently,

require responsibility by the judge to assert knowledge of the trial record as well as knowledge of the law applicable to the facts supported by the factual integrity of the trial record. These contours are as constitutionally significant for the preservation of Due Process values under the 14th Amendment for the state judiciary as they are under the 5th Amendment for the federal judiciary. See Gryger v. Burke, supra, 334 U.S., at 732-736 (Justices Rutledge, Black, Douglas and Murphy dissenting).

The stated purpose of the 1981 amendment eliminating the requirement of written findings of fact and conclusions of law in civil cases such as the matter at hand in this case was to save court and attorney time and reduce post-trial hearings.[50/] The interests of saving time

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50/ See note 45.

and reducing the number of hearings was intended to benefit those participants with a continuing role in the legal system, both practitioners and judges. The interests that were forgotten were those fundamental constitutional interests of the litigant, the right to know for the purposes of appeal of the judgment that all of the testimony and evidence presented in the proceeding was considered in the rendering of the decision and that there was present a discerning line of reasoning connecti ng determinations of facts with legitimate principles of law in the conscious sorting out of all the testimony and extrinsic evidence presented in the record.

What was forgotten in the enactment of this legislation was the recognition that the written decision signed by a judge not only provides the

litigant with a statement of how the judge viewed the rest of the record for the purposes of appeal, but also that the written decision is a part of the record itself to indicate whether the judge, himself or herself, acted independently and neutrally.

(5) Certiorari Should Be Granted to Review a State Trial Court Decision to Determine Whether That Decision Was Arbitrary and Capricious Under the Trial Court Record and Denied Petitioners Their Rights to Due Process and Equal Protection of the Laws Guaranteed by the 14th Amendment

This Court should review the Decision of the state trial court and the underlying record to determine whether the Decision was arbitrary and capricious and thereby denied Petitioners their rights to Due Process and Equal Protection of the laws under the 14th Amendment.

The absense of support in the

trial record for the Decision in this case violates the two (2) central concerns of procedural due process: (1) the prevention of unjustified or mistaken deprivations of life, liberty or property, and (2) the promotion of participation and dialogue by affected individuals in the decision making process. Marshall v. Jerrico, Inc., supra, 446 U.S., at 442.

The distortion of the record and the avoidance of the integrity of the trial record in this case by the attorney for the prevailing party in authoring the Decision uncritically accepted without change by the signature of the state trial court judge violated both of these central concerns. Even if the legal fiction that the Decision was the decision of the trial court judge were conceded and accepted, the two central concerns of procedural due process were

violated in the distortion of and avoidance of the integrity of the trial record.

The participation of Petitioners in the trial in this case was reduced to an unheard monologue. They were deprived of their property by the trial court mistakenly and unjustifiably.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the untitled decision of the court of appeal.

Respectfully submitted,

JAMES REYER

P.O. Box 5876
Santa Rosa, California
95402-5876

(707) 527-2688

Counsel for Petitioners

APPENDIX

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MENDOCINO

VELDA G. BRADY, ARTHUR BECKTOLD and JOSEPH BECKTOLD,	)	NO. 50813
Plaintiffs,	)	TENTATIVE DECISION
vs.	)	
JOHN R. WEBER, et al.,	)	
Defendants.	)	

This action for partition was heard February 20, 1986 and May 28 1986 and submitted, TIMOTHY O. STOEN, appearing for Plaintiff and DAVID RIEMENSCHNEIDER appearing for Defendants.

On March 30, 1972, Plaintiff ARTHUR BECKTOLD, through VELDA G. BRADY, took title to a 1/4 interest in the property in question, 1/4 went to ALLEN GREGORY GRAVES [sic] and 1/2 to STEPHEN and ANNE KAYLOR. Plaintiff ARTHUR BECKTOLD had wanted to invest in real property. His brother JOSEPH BECKTOLD is dyslexic and cannot read or write. He

was and is on social security disability. Title for Plaintff ARTHUR BECKTOLD was taken in the name on an aunt VELDA G. BRADY. Joseph lived on the property and took care of it. In 1977 GREGORY WONDERWHEEL succeeded to the interest of Cravens. The Kaylors wanted out of the property so the Plaintiff BECKTOLD put up the money. The agreement was to sell the property to Velda and Wonderwheel.

Thereafter, for no consideration that the court can find, the Defendant had Velda Brady deed a third of her one half to one Weber. Wonderwheel also deeded one third to him.

Based on the evidence adduced, the court finds there was no agreement for a so called pre-emptive right to buy out based on the amount paid in. The court finds that the deeds made by Brady to Wonderwheel and Weber were obtained by fraud an no consideration was paid. For

example, Weber was on welfare when he claimed to [sic] he made payments for which he has no receipts.

The court finds that ARTHUR L. BECKTOLD owns one half of the property and GREGORY WONDERWHEEL owns one half.

The prayer for partition by sale is granted and after the costs of sale are paid, the proceeds will be divided as indicated.

Plaintiff to receive costs in this action. Attorney for Plaintiffs is requested to prepare any further pleadings as required.

Dated: July 9, 1986

ARTHUR B. BROADDUS
JUDGE OF THE SUPERIOR COURT

TIMOTHY O. STOEN
Attorney at Law
1889 Building
Post Office Box 1567
Ukiah, California 95482

Telephone: (707) 468-8522

Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MENDOCINO

VELDA G. BRADY, ARTHUR L. BECKTOLD, and JOSEPH BECKTOLD	)	Case No. 50813
Plaintiffs,	)	AMENDED ~~PROPOSED~~
versus	)	STATEMENT OF DECISION
JOHN R. WEBER and GREGORY M.L.V. WONDERWHEEL,	)	[CCP SS 632]
Defendants.	)	

The above-entitled action for partition came on regularly for trial on February 20, 1986, and May 28, 1986, in Department 1 of the above-entitled court, the Honorable ARTHUR B. BROADDUS, Judge, presiding without a jury, and was tried on said dates. TIMOTHY O. STOEN appeared

as counsel for plaintiffs, and DAVID RIEMENSCHNEIDER appeared as counsel for defendants.

Oral and documentary evidence was introduced on behalf of the respective parties, and the cause was argued and submitted for decision. On July 9, 1986, the court, having considered the evidence and heard the arguments of counsel and being fully advised, issued its Tentative Decision. On July 18, 1986, plaintiffs submitted their Proposed Statement of Decision. On July 21, 1986, defendants filed their Request for Statement of Decision. On July 25, 1986, defendants filed their Supplemental Request for Statement of Decision.

Pursuant to Code of Civil Procedure, Section 632, the court issues the following Statement of Decision on the issues raised by defendants in their above-mentioned request and supplemental

request:

FIRST ISSUE

1. The first issue raised is: "Who are the owners of the real property which is the subject matter of this litigation and what are their respective interests."

With regard to this issue, the court's decision is that plaintiff ARTHUR L. BECKTOLD ("ARTHUR") is the owner of an undivided three-fourths (3/4) interest, and that defendants GREGORY M.L.V. WONDERWHEEL ("WONDERWHEEL") and JOHN R. WEBER ("WEBER") are the owners of the remaining one-fourth (1/4). The relative ownerships of this one-fourth interest between said defendants is as follows: GREGORY M.L.V. WONDERWHEEL is the owner of an undivided one-sixth (1/6) and JOHN R. WEBER is the owner of an undivided one-twelfth (1/12).

a. The court based its

decision on the following facts:

(1) At Time of Purchase. The property was purchased on or about March 30, 1972, at which time plaintiff ARTHUR L. BECKTOLD, through title taken by plaintiff VELDA G. BRADY, obtained ownership in trust of an undivided one-fourth (1/4) interest; defendant GREGORY M.L.V. WONDERWHEEL, through his earlier name of ALAN GREGORY CRAVENS, took title to an undivided one-fourth (1/4) interest; and the remaining undivided one-half (1/2) interest went to STEPHEN and ANNE KAYLOR. Prior to said purchase ARTHUR L. BECKTOLD had wanted to invest in real property, and had authorized his brother, plaintiff JOSEPH BECKTOLD, to live on the property and take care of it, which he did. JOSEPH BECKTOLD is dyslexic and cannot read or write, and he was and is on social security disability; these facts were known to both defendants

at the time of purchase. ARTHUR L. BECKTOLD provided all of the consideration for the one-fourth interest taken in the name of his aunt, VELDA G. BRADY.

(2) After KAYLOR transaction. ANNE KAYLOR acquired all of the interest of STEPHEN KAYLOR prior to January 13, 1977, at which time she signed a unilateral agreement to sell her entire undivided one-half (1/2) interest to VELDA G. BRADY "and/or" GREGORY WONDERWHEEL for $3,600, a sum subsequently raised to $4,500 plus cancellation of a $2,000 indebtedness to plaintiffs. ARTHUR L. BECKTOLD provided all of the cash consideration of $4,500, which was paid directly to ANNE KAYLOR by a check for $4,500 from VELDA G. BRADY. ARTHUR L. BECKTOLD had, prior thereto, made tax payments and payments on the property for the one-half (1/2) interest

owned by the KAYLORS in amounts exceeding $2,000, for which ANNE KAYLOR became correspondingly indebted to plaintiffs. Thus the consideration provided to ANNE KAYLOR for the one-half (1/2) interest referred to by the aforesaid agreement dated January 13, 1977, was $6,500. All of this $6,500 was provided by plaintiff ARTHUR L. BECKTOLD. Prior to the aforesaid $4,500 payment to ANNE KAYLOR, ARTHUR L. BECKTOLD had also made tax payments and land payments on the property for defendant GREGORY WONDERWHEEL, who was correspondingly indebted to plaintiffs at the time of the $4,500 payment by plaintiffs to ANNE KAYLOR.

GREGORY WONDERWHEEL was the fiduciary of VELDA G. BRADY and JOSEPH BECKTOLD (who was acting as agent for ARTHUR L. BECKTOLD) and was entrusted with the good-faith preparation of

documents pertaining to the property. After ANNE KAYLOR had received the $4,500 from plaintiffs, GREGORY WONDERWHEEL prepared, without the knowledge or consent of plaintiffs and with the intent to defraud VELDA G. BRADY and JOSEPH BECKTOLD, a quitclaim deed dated June 30,1977 ("the KAYLOR deed"), from ANNE KAYLOR giving himself one-half of her one-half interest, thereby defrauding VELDA G. BRADY (and ARTHUR BECKTOLD) of a one-quarter (1/4) interest in the property.

Although GREGORY WONDERWHEEL testified he reimbursed VELDA G. BRADY shortly after her $4,500 payment was made, his testimony is not credible because (1) he gave no adequate explanation why he didn't pay any money directly to ANNE KAYLOR though having continuing access to her, and (2) provided no evidence of any endoresement

or signature by VELDA G. BRADY showing she received any money at all. (In fact, the only "documentary" evidence provided by GREGORY WONDERWHEEL lacked trustworthiness in that (1) they were carbon copies of (2) unauthenticated "records" of a local financial institution (3) on a date after her payment of the $4,500 to ANNE KAYLOR (4) with no reference whatsoever to the property or any other purpose. GREGORY WONDERWHEEL failed to call any witness connected with said local financial interests to testify either as preparer of the "records" or as custodian thereof, further indicating their untrustworthiness.) Even if the alleged payments had been received, which was never proved, the lack of an adequate explanation as to why they were not made directly to ANNE KAYLOR, and the testimony that GREGORY WONDERWHEEL was

indebted to plaintiffs for ARTHUR BECKTOLD'S having made tax and land payments on his behalf, leads the Court to conclude any such payments were payments on that pre-existing indebted ness for taxes and payments on the land.

By a deed dated May 17, 1979, GREGORY WONDERWHEEL purported to grant to JOHN R. WEBER "an undivided one-third interest of my undivided one-half interest" in the property.

(3) After BRADY-WEBER deed. GREGORY WONDERWHEEL and JOHN R. WEBER subsequently prepared a grant deed dated July 12, 1979, ("the BRADY-WEBER deed") for VELDA G. BRADY'S signature, which purported to grant to JOHN R. WEBER an undivided one-sixth (1/6) interest in the property. VELDA G. BRADY'S signature was induced by JOHN R. WEBER'S promise that he would pay for such interest. JOHN R. WEBER never paid any

consideration for that interest; he was on welfare at the time, and at trial he provided no receipts or documents whatsoever. At the time of making the aforesaid promise, JOHN R. WEBER intended not to keep said promise, thereby intending to defraud VELDA G. BRADY of a one-sixth 1/6 interest in the property.

b. The legal basis for the Court's decision is as follows:

(1) At Time of Purchase. At the time of the purchase of the property on or about March 30, 1972, when the transfer of the 1/4 interest to VELDA G. BRADY was made and the consideration therefor was provided by ARTHUR L. BECKTOLD, a trust resulted in favor of ARTHUR L. BECKTOLD under Civil Code, Section 853, for that one-fourth 1/4 interest. Section 853 provides that "When a transfer of real property is made to one person and the consideration

therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." By continuing to provide all of the consideration for the interests transferred to the name of VELDA G. BRADY, a trust resulted in favor of ARTHUR L. BECKTOLD for all of VELDA G. BRADY'S subsequently acquired legal and equitable interests, including all of ANNE KAYLOR'S interest as of the date of the June 30, 1977 deed and the one-sixth 1/6 interest fraudulently induced by the deed date July 12, 1979. As an independent basis, ARTHUR L. BECKTOLD acquired all of the interest of VELDA G. BRADY by virtue of the quitclaim deed from VELDA G. BRADY dated July 1, 1985.

(2) After KAYLOR transaction. Regarding the KAYLOR interest, plaintiffs acquired her full one-half 1/2 interest under two separate

doctrines: ujust (sic) enrichment and fraud. By giving himself and keeping one-half (1/2) of ANNE KAYLOR'S one-half (1/2) interest, GREGORY WONDERWHEEL'S acquisition and retention were wrongful and constitute unjust enrichment, giving rise to a constructive trust in plaintiffs.

> [T]he wrongful act giving rise to a constructive trust need not amount to fraud or intentional misrepresentation. All that must be shown is that the acquisition of the property was wrongful and that the keeping of the property by the defendant would constitute unjust enrichment.
>
> Witkin, Summary of California Law, (8th Ed.), 1984 Supplement p. 193, citing Calistoga Civic Club v. Calistoga, (1983) 143 Cal.App.3d 111, 117, 191 Cal.Rptr. 571.

ARTHUR L. BECKTOLD thus acquired a constructive trust in the one-fourth (1/4) interest in the property deeded to WONDERWHEEL by providing all of the consideration for that one-fourth (1/4) interest. This is consistent with, and

the most reasonable interpretation of, the unilateral agreement executed by ANNE KAYLOR on January 13, 1977, whereby she agreed to convey to VELDA G. BRADY "and/or" GREGORY WONDERWHEEL. The inclusion of the word "or" can only reasonably mean that if either VELDA G. BRADY or GREGORY WONDERWHEEL were to provide all the consideration, that person would be entitled to all of ANNE KAYLOR'S one-half 1/2 interest. It is undisputed that VELDA G. BRADY paid (with ARTHUR BECKTOLD'S funds) all of the $4,500, thereby giving VELDA G. BRADY (and ARTHUR BECKTOLD) the right to receive the full one-half (1/2) interest under the doctrine of unjust enrichment.

Plaintiffs also acquired the full one-half (1/2) interest on the grounds of fraud. GREGORY WONDERWHEEL knowingly and intentionally represented VELDA G. BRADY and JOSEPH BECKTOLD in dealing with ANNE

KAYLOR, and hence was an "agent" and a "fiduciary," thus incurring the "obligation of diligent and faithful service . . . as of a trustee." Witkin, Summary of California Law (8th Ed.), p. 645. Plaintiffs entrusted GREGORY WONDERWHEEL with the faithful preparation of the deed, but GREGORY WONDERWHEEL violated his obligation as a fiduciary by giving himself one-half (1/2) of ANNE KAYLOR'S interest without providing any consideration and with no intention of providing any consideration. His intention was to defraud VELDA G. BRADY of a one-quarter (1/4) interest in the property and in fact committed fraud upon her (see discussion under the Eleventh issue herein).

For the foregoing reasons, VELDA G. BRADY and ARTHUR L BECKTOLD acquired an equitable ownership in the one-quarter (1/4) interest conveyed to defendant

GREGORY WONDERWHEEL by the quitclaim deed June 30, 1977. Said deed should be, and is, reformed to eliminate the words "and ALAN GREGORY M.L.V. WONDERWHEEL" as grantee.

GREGORY WONDERWHEEL therefore held only his original 1/4 interest in the property when he purported to convey, by a deed dated May 17, 1969, "an undivided one-third interest of my undivided one-half interest" in the property. Absent any agreement between GREGORY WONDERWHEEL and JOHN WEBER to the contrary, the most reasonable interpretation under the evidence produced is that JOHN WEBER receive 1/3 of whatever GREGORY WONDERWHEEL had, which was 1/4. Hence JOHN R. WEBER acquired, and now has, a 1/12 interest in the property.

(3) After BRADY-WEBER deed. Plaintiffs retained the one-sixth (1/6) interest purportedly conveyed to

JOHN R. WEBER in the July 12, 1979 deed under the doctrines of unjust enrichment and of fraud. By receiving a benefit of a one-sixth (1/6) interest for which he paid no consideration, JOHN R. WEBER was unjustly enriched. By inducing VELDA G. BRADY'S signature by a promise which he never intended to keep, JOHN R. WEBER committed fraud upon her (see discussion under the Eleventh issue herein). Under each theory, VELDA G. BRADY and ARTHUR L. BECKTOLD retained an equitable ownership interest in the 1/6 interest conveyed by said deed. Said deed should be, and is, cancelled.

SECOND ISSUE

2. The second issue raised is: "Whether or not there was any oral or written agreement among the owners (or their agents) of the subject real property regarding the right to buy out

any co-owner who wished to sell his or her interest, and, if so, what were the terms of any such agreement."

With regard to this issue, the Court's decision is that there was not any such oral or written agreement. (The alleged agreement is herein referred to as a "pre-emption agreement.")

a. The Court based its decision on the following facts: Absolutely no evidence was introduced showing any written pre-emption agreement, so any such agreement would have been oral. ARTHUR L. BECKTOLD and JOSEPH BECKTOLD at trial unequivocally denied that any such agreement was ever entered into. ARTHUR L. BECKTOLD bought the property for investment purposes and had explicitly prohibited in writing his agent, JOSEPH BECKTOLD, from encumbering the property after explaining the meaning of "encumber" to him. JOSEPH promised to

protect ARTHUR'S interest and not to agree to any legal restrictions on the property without ARTHUR'S approval. JOSEPH was dependent on ARTHUR BECKTOLD in order for him to have the right to live on the property; he also had respect for ARTHUR BECKTOLD as his brother. No pre-emption agreement was put in writing, although there was ample opportunity to do so at the time of the agreement dated January 13, 1977, which was prepared by an attorney and was a part of the entire sales transaction involving ANNE KAYLOR. Furthermore, when a pre-emption agreement was first put into written form in 1984 and presented by GREGORY WONDERWHEEL to JOSEPH BECKTOLD for JOSEPH'S signature, it was rejected by JOSEPH. (Defendants did not discuss such an agreement with VELDA G. BRADY and did not know of the existence of ARTHUR L. BECKTOLD, so the existence of such an agreement depends on

whether agreed to by JOSEPH BECKTOLD.)

b. The legal basis for the Court's decision is as follows: The burden is on the defendants to prove as an affirmative defense there was a pre-emption agreement. Defendants failed to meet that burden. Defendants failed to show any signature by any plaintiff memorializing or otherwise indicating the existence of a written agreement. Defendants failed to present any appraisers to testify that the consideration paid ANNE KAYLOR was not within the range of fair market value (said consideration being $4,500 plus the $2,000 that the KAYLOR'S were in default on, i.e. a total of $6,500). The failure of defendants to put such an agreement in writing after conferring with an attorney about other aspects of the KAYLOR sale tends to show there was no such agreement. The immediate rejection of

such an agreement when first presented in a writing tends to show there was no such oral agreement. The failure of GREGORY WONDERWHEEL to present such a written document to VELDA G. BRADY when he knew she signed all of the legal and financial documents affecting plaintiff's interest in the property tends to show he was trying to force acknowledment in writing of a restriction that did not already exist unwritten. The inconsistency of such a pre-emption agreement (1) with the investment purposes of ARTHUR L. BECKTOLD and (2) the express duties owed to ARTHUR by JOSEPH (not to encumber) both tend to prove that JOSEPH never agreed to any such restriction as implied by a pre-emption agreement.

In addition to the basis that the defendants failed to sustain their burden of proving the existence of either a written or oral pre-emption, the right to

partition is not validly waived by a pre-emption agreement of the kind alleged herein. An agreement requiring a co-owner to sell to another co-owner at the amount of investment plus interest is in the nature of a fixed-price pre-emption agreement, which is prohibited by section 711 of the Civil Code. This section provides that "conditions restraining alienation, when repugnant to the interest created, are void." There is only one California case that has construed section 711 with respect to a fixed-price pre-emption agreement. In this case, Maynard v. Polhemus, (1887) 74 Cal. 141, 15 P.450, the Supreme Court reviewed a deed containing the following clause in the nature of a fixed price pre-emption agreement:

> * * * with the sole provision that if the said Cooper should ever sell any of the aforesaid property, it shall be sold to the said DePeyster at the aforesaid price.

The court explicitly condemned this clause in the following language:

> Regarded as a condition, it is unreasonable and contrary to the policy of the law, because in restraint of alienation.
>
> Maynard v. Polhemus, (1887) 74 Cal. 141, 15, p.450, 451, 452.

THIRD ISSUE

3. The third issue raised is: "Whether or not Anita Hendry, formerly Ann Kaylor, received fair market value for her interest in the subject real property upon the sale of her interest."

With regard to this issue, the court's decision is that this is not a material issue. Even if it had been a material issue, defendants failed to prove what the fair market value was for said interest. Hence the court has no basis for determining whether or not ANNE KAYLOR received fair market value.

a. The court based its decision on the following facts: The complaint does not raise the issue of the fair market value of ANNE KAYLOR'S interest, and the answer does only to the extent that there has first been established the existence of an oral pre-emption agreement, which the court has found above did not exist.

The answer raises two affirmative defenses. The first is pre-emption, wherein defendants alleged that plaintiffs "orally agreed . . . that they have a pre-emptive right to buy from the others in the event one of them desired to sell his interest in said property, and that the terms of the agreement were that the sale would be for whatever amount of money the selling party had invested in the property plus reasonable interest," and that "pursuant to said oral agreement" JOSEPH BECKTOLD "in 1977

purchased Anne Taylor's [sic] interest in said real property for the amount of her investment plus reasonable interest."

Defendants at trial failed to prove the existence of an oral or written pre-emption agreement. Defendants failed to prove the amount of money the KAYLORS had invested in the property. Defendants failed to present any qualified appraiser or other expert to testify as to the fair market value of ANNE KAYLOR'S one-half (1/2) interest in 1977, which is when the sale of her interest took place.

Moreover, even if defendants had proved an oral pre-emption agreement, the court finds they did not prove that the purchase price of $6,500 was not within the range of fair market value given the facts of (1) ANNE KAYLOR'S need for money and desire for immediate sale, (2) ANNE KAYLOR'S decision to sell being totally voluntary and without any pressure

whatsoever from her co-owners, (3) the lack of a ready "market" for the early sale of only a one-half interest in property whose other owners do not desire to sell, and (4) the fact that ANNE KAYLOR agreed on January 13, 1977 to sell for $3,600, a figure subsequently raised to $6,500 and thereby tending to prove negotiations which were not restricted to purchase price plus interest.

The second affirmative defense raised by defendants is estoppel: "By virtue of said agreement and action, plaintiffs are estopped from obtaining judicial partition of said real property." But defendants (1) failed to show the existence of "said agreement," (2) failed to show that either defendant was induced to take any action by virtue of the sale of ANNE KAYLOR'S property, and (3) failed to show any of the other elements of estoppel.

b. The legal basis for the court's decision of non-materiality is that ARTHUR L. BECKTOLD as the holder of a present "concurrent interest" in the property became entitled, under section 872.710(b) of the Code of Civil Procedure, to "partition . . . as of right unless barred by a valid waiver." The only way for defendants to bar partition is to allege and prove a waiver. The only theories of waiver alleged were the pre-emption agreement and estoppel.

As for the pre-emption agreement theory, the court has already found no such agreement was ever made, whether written or oral. Hence the fair market value of ANNE KAYLOR'S interest at the time of the sale is immaterial under this first theory of waiver.

As for the estoppel theory of waiver, the burden was on defendants to

prove each of five elements:

> It has been said there must be (1) a representation or concealment of material facts (2) made with knowledge, actual or virtual, of the facts (3) to a party ignorant, actually and permissibly, of the truth (4) with the intention, actual or virtual, that the latter act upon it; and (5) the party must have been induced to act upon it. (Wood v. Blaney, supra, 107 C. 295; Witkin, Summary of California Law (8th Ed.), 535 (emphasis in Witkin).

By failing to prove that JOSEPH BECKTOLD entered into an oral pre-emption agreement, the defendants failed to prove a "representation or concealment" to "a party," and hence failed to prove element one, two or three. Even if there had been an oral pre-emption agreement, there was obviously no "intention" in JOSEPH BECKTOLD that "the latter," i.e. parties GREGORY WONDERWHEEL or WEBER, act upon it, even if ANNE KAYLOR had acted upon it; hence they failed to prove element

four. Finally, neither defendant was "induced to act upon" any representation or concealment by JOSEPH BECKTOLD because neither was asked by JOSEPH BECKTOLD to take any action whatsoever and neither took any action in reliance whatsoever; hence defendants failed to prove the fifth element of estoppel. Having failed to prove the elements of estoppel, the issue of the fair market value of ANNE KAYLOR'S interest at the time of sale is immaterial.

As a final matter, the court reiterates that even though defendants failed to prove even a prima facie case of estoppel so as to render the issue of fair market value material, the defendants failed to prove that the consideration received by ANNE KAYLOR in 1977 was not fair market value, which was their burden.

FOURTH ISSUE

4. The fourth issue raised is: "Whether or not Anita Hendry's testimony was credible when she testified that Joseph Becktold insisted that she only receive the money she had paid into the subject real property rather than the fair market value for her interest."

With regard to this issue, the court's decision is that by asking for a ruling on a single witness's "credibility," this issue asks for a statement as to "evidentiary" facts, whereas a statement of decision is to state only "ultimate" facts. Therefore the court makes no finding on the "credibility" of ANNE KAYLOR'S testimony. The court has already found on the ultimate issue of a pre-emption agreement that JOSEPH BECKTOLD made no such agreement, thus rendering ANNE KAYLOR'S "credibility" immaterial as an ultimate

issue in a statement of decision.

a. The court based its decision on the following facts: the answer raises only two affirmative defenses, namely a pre-emption agreement and estoppel. The court has already found that JOSEPH BECKTOLD did not enter a pre-emption agreement, being under an explicit written obligation to the real owner ARTHUR L. BECKTOLD not to encumber the property and at trial unequivocally denying ever entering such an agreement.

b. The legal basis for the court's decision is People v. CasaBlanca Convalescent Homes, Inc. (1984 159 Cal.App.3d 509, 206 Cal.Rptr. 164, which held that a statement of decision need state only ultimate, rather than evidentiary, facts. A single witness may testify in good faith as to a fact but have a faulty memory as to exact words over the passage of years, or have had

inadequate perception, which must be weighed against the opposing testimony of other credible witnesses; the court has already found in examining the overall context of facts that JOSEPH BECKTOLD neither intended to enter any pre-emption agreement, and was bound to his brother not to do so, which the court finds is inconsistent with and outweighs this alleged testimony of ANNE KAYLOR, particularly when, as here, the burden of proving the disputed fact was on the party calling ANNE KAYLOR, i.e., the defendants.

FIFTH ISSUE

5. The fifth issue raised is: "Whether or not Joseph Becktold was the agent for Arthur Becktold regarding the subject property."

With regard to this issue, the court's decision is that JOSEPH BECKTOLD

at all relevant times was the agent for ARTHUR L. BECKTOLD.

a. The court based its decision on the following facts: ARTHUR L. BECKTOLD and JOSEPH BECKTOLD entered into a written agreement dated January 6, 1971, which required (1) that JOSEPH BECKTOLD purchase the property "in behalf of Arthur L. Becktold," (2) that "Joseph Becktold shall not have the right to encumber" the property "in any manner," and (3) that "Joseph Becktold shall maintain the above-mentioned property for Arthur L. Becktold." Further, ARTHUR L. BECKTOLD and JOSEPH BECKTOLD both testified at trial that JOSEPH was acting as ARTHUR'S agent in dealing with the property.

b. The legal basis for the court's decision is that an agency was created by the January 6, 1971 agreement and by the conduct of JOSEPH BECKTOLD in

clearing major decisions with ARTHUR. The fact the agency was not disclosed does not destroy the existence of the agency, any more than the non-disclosure of JOHN R. WEBER as GREGORY WONDERWHEEL'S admitted "secret" partner destroyed the existence of that partnership.

SIXTH ISSUE

6. The sixth issue raised is: "Whether or not Joseph Becktold disclosed to anyone that he was the agent for Arthur Becktold regarding the subject real property."

With regard to this issue, the court's decision is that JOSEPH BECKTOLD did not disclose to anyone that he was the agent for ARTHUR BECKTOLD regarding the subject property.

a. The court based its decision on the following facts: JOSEPH BECKTOLD testified he never disclosed his agency

to defendants, and defendants testified that JOSEPH BECKTOLD did not disclose to them any agency relationship or even the existence of ARTHUR L. BECKTOLD.

b. The legal basis for the court's decision is that this is an uncontroverted issue. Said fact of nondisclosure of agency must be found to be true because admitted by all parties.

SEVENTH ISSUE

7. The seventh issue raised is: "Whether any consideration was paid by Alan Gregory Wonderwheel toward the purchase of Anne Kaylor's interest in the subject real property, and if so, how much."

With regard to this issue, the court's decision is that no consideration was paid by ALAN GREGORY WONDERWHEEL toward the purchase of ANNE KAYLOR'S interest in the property.

a. The court based its decision on the following facts: The sum total of cash consideration received by ANNE KAYLOR was $4,500 in the form of a check from VELDA G. BRADY, all of which had been provided solely by ARTHUR L. BECKTOLD. The additional consideration received by ANNE KAYLOR was $2,000 in the form of cancellation of indebtedness to VELDA G. BRADY (and through her, to ARTHUR L. BECKTOLD, who had provided all of the $2,000 going to the KAYLOR'S share of tax and land payments for the five years from time of purchase). GREGORY WONDERWHEEL was in communication with ANNE KAYLOR at the time of said $4,500 payment yet admitted he paid her nothing. Furthermore, he had no explanation as to why he didn't pay her directly. In trying to prove reimbursement to VELDA G. BRADY, GREGORY WONDERWHEEL (1) provided no evidence of an endorsement or a

signature by VELDA G. BRADY showing receipt of reimbursement, (2) provided only untrustworthy evidence in the form of unauthenticated carbon copies of documents on a local financial institution with no reference to property or purpose, and (3) failed to call as a witness any representative or employee from the financial institution to testify as to method of preparation or otherwise establish foundational facts regarding these inherently untrustworthy "records." Additional factual basis is set forth under the preceding issues discussed in this statement of decision.

b. The legal basis for the court's decision is that all of the consideration contemplated by ANNE KAYLOR for her one-half (1/2) interest was unequivocally provided by plaintiffs. If the January 13, 1971 agreement is to have any meaning in using the word "or," there

was presumptively created in plaintiffs a right to all of ANNE KAYLOR'S interest by providing all of the $6,500 CONSIDERATION. The burden was then on defendant GREGORY WONDERWHEEL to prove he made payments of reimbursement to VELDA G. BRADY as consideration for a share of ANNE KAYLOR'S interest, which he failed to do. His failure to call employees of the local financial institution to testify as to the method of preparation of the "records" he did offer was not explained, nor did he explain his failure to pay ANNE KAYLOR directly although explicity asked to do so by the court. In light of the other evidence such as GREGORY WONDERWHEEL'S attempt to get JOSEPH BECKTOLD to sign in 1984 a pre-emption agreement he knew JOSEPH could not read, the court concludes that GREGORY WONDERWHEEL was engaged in attempts to take advantage of JOSEPH

BECKTOLD and VELDA G. BRADY, and therefore the court does not find at all credible his testimony of paying reimbursement to VELDA G. BRADY for ANNE KAYLOR'S interest.

EIGHTH ISSUE

8. The eighth issue raised is: "Whether or not John Weber made any payments to the note-holder for the subject real property."

With regard to this issue, the court's decision is that JOHN R. WEBER did not make any payments to VELDA G. BRADY or to any other plaintiff or to any "note-holder."

a. The court based its decision on the following facts: JOHN R. WEBER was on welfare at the time of the deed dated July 12, 1979 purported conveying a one-sixth (1/6) interest to him from VELDA G. BRADY. JOHN R. WEBER produced no receipts or other evidence of

any payment of consideration to VELDA G. BRADY. JOSEPH BECKTOLD testified that JOHN R. WEBER did not pay any consideration for that interest. JOHN R. WEBER was vague as to the exact amount he allegedly provided.

b. The legal basis for the court's decision is that JOSEPH BECKTOLD testified no consideration was received by plaintiffs from JOHN R. WEBER for said interest, and that there were no receipts or credible testimony offered at trial to the effect that consideration was ever paid for that interest. On the basis of the evidence, the court finds that JOSEPH BECKTOLD'S testimony of no consideration is the true version. In making the finding the court takes into account the evidence showing that JOHN R. WEBER and GREGORY WONDERWHEEL acted as partners and co-fiduciaries of VELDA G. BRADY and JOSEPH BECKTOLD, taking willful advantage

of VELDA'S age and geographic remoteness in southern California and JOSEPH BECKTOLD'S dyslexia. Together they induced JOSEPH BECKTOLD'S trust, and JOHN R. WEBER arranged to be deeded a one-sixth (1/6) interest in the property by making a promise to pay for it which he neither intended to keep nor, being on welfare, had the means to keep. By receiving no consideration, VELDA G. BRADY (and ARTHUR L. BECKTOLD) are entitled to restitution and return of that one-sixth (1/6) interest on the basis not only of unjust enrichment but also fraud.

NINTH ISSUE

9. The ninth issue raised is: "Whether or not the property is so situated that a division into subparcels of equal value cannot be made."

With regard to this issue, the court's decision is that under the

circumstances, sale and division of the proceeds would be more equitable than division of the property. "Equitability" is the ultimate fact for purposes of a statement of decision, not the "situation" of the property. For purposes of completeness, however, the court's decision is that the property is not so situation [sic] that a division into subparcels of equal value can be made.

a. The court based its decision on the following facts: JOHN R. WEBER has prevented the peaceful and free use of the property by JOSEPH BECKTOLD, as caretaker and agent of ARTHUR L. BECKTOLD and VELDA G. BRADY, in that JOHN R. WEBER (1) flaunted weapons on the property, (2) told JOSEPH that he had used JOSEPH'S cabin to "sell drugs," (3) encouraged people to drive on the access road at all hours of the night disturbing

the peace, and (4) fired weapons into the air at night. This conduct was a major cause in plaintiffs' decision to partition, and it would be inequitable to require plaintiffs to remain owners of the property after such harassment during the time-consuming process of dividing the property into salable lots, which requires compliance with the Mendocino County land division regulations.

Secondly, this issue in the form raised by defendants is immaterial in that the court has found that the respective ownership interests are not "equal" but, rather: 3/4, 1/6 and 1/12.

Thirdly, the property is subject to a 40-acre minimum lot size restriction, and cannot be divided physically into any subparcels of legal size.

Finally, the property has only one access road, is hilly, and is

topographically not so situated that a division into subparcels reflecting ownership interests can be made.

b. The legal basis for the courts decision is as follows: Section 872.289 of the Code of Civil Procedure provides "the court shall order the property be sold and the proceeds be divided among the parties in accordance with their interests" if it determines that "under the circumstances, sale and division of the proceeds would be more equitable." The conduct of JOHN R. WEBER and GREGORY WONDERWHEEL in violating their fiduciary obligation to VELDA G. BRADY and JOSEPH BECKTOLD, and of JOHN R. WEBER in depriving JOSEPH BECKTOLD of peaceful and free enjoyment of the premises, constitutes "unclean hands," justifying the court in finding that the "equitable" circumstances require ARTHUR L. BECKTOLD to get his money out of the

propety as quickly as possible. The court takes judicial notice of the laws requiring the processing by the county of any dividing of property, which are time-consuming and would thus be "inequitable" to ARTHUR L. BECKTOLD. The criterion for determining whether the division should be by sale is a broad-scale determination of equities, not of the "situation" of the property, which is only a factor in the general picture of the equities and which is not even singled out as a factor by the provisions of the Code of Civil Procedure governing partition actions (Code of Civil Procedure, sections 872.010 through 874.240).

TENTH ISSUE

10. The tenth issue raised is: "Whether or not, due to the particular situation of the land, that a partition in kind would substantially diminish the

value of each party's interest."

With regard to this issue, the court's decision is that this is an immaterial issue. The sole criterion for determining whether the property should be divided by sale is whether such would be more "equitable" than division of the property. The court's decision is that division of sale is more "equitable," as set forth under the previous issue.

a. The court based its decision on the following facts: the same facts as set forth under the previous issue.

b. The legal basis for the court's decision is as follows: the same legal basis as set forth under the previous issue.

ELEVENTH ISSUE

11. The eleventh issue raised is: "Whether there was any fraud regarding

deeds made by Brady to Wonderwheel and Weber."

With regard to this issue, the court's decision is that fraud was committed regarding both deeds.

a. The court based its decision on the following facts: the facts as set forth under the previous issues herein, particularly the first issue.

b. The legal basis for the court's decision is as follows: The same legal basis set forth under the previous issues herein, particularly the first issue, including the court's determination that the evidence shows that all of the elements of fraud have been met with respect to each deed. "The elements of fraud . . . are (1) misrepresentation . . .; (2) knowledge of falsity . . .; (3) intent to defraud, i.e., to induce reliance; (4) justifiable

reliance; and (5) resulting damage." Witkin, Summary of California Law (8th Ed.), p. 2711.

With respect to the ANNE KAYLOR deed dated June 30, 1977, the evidence showed that (1) by preparing said deed giving himself a one-half (1/2) of ANNE KAYLOR'S interest, GREGORY WONDERWHEEL thereby represented that he had paid and would pay one-half of the consideration for said interest, i.e., one-half (1/2) of $6,500; (2) by not paying any consideration to ANNE KAYLOR directly and by not paying reimbursement to VELDA G. BRADY as reimbursement, WONDERWHEEL knew he had not paid for that interest and never intended to do so; (3) by inducing ANNE KAYLOR'S signature on the deed, and by not paying consideration to nor disclosing the deed to VELDA G. BRADY or JOSEPH BECKTOLD, WONDERWHEEL intended to defraud; (4) by virtue of

WONDERWHEEL'S ongoing position as fiduciary, the reliance on his preparing the deed was justifiable; and (5) by losing one-fourth (1/4) interest in the property, plaintiffs suffered substantial damage.

With respect to the deed to JOHN R. WEBER dated June 12, 1979, the evidence showed that (1) by making a promise to pay VELDA G. BRADY consideration for a one-sixth (1/6) interest in the property, JOHN R. WEBER made a material representation of his present state of mind and intention to pay; (2) by not intending to keep said promise at the time he made it and by never paying the consideration, JOHN R. WEBER had knowledge of the falsity of his representation; (3) by making said promise for the purpose of inducing VELDA G. BRADY'S signature on the deed, JOHN R. WEBER had an intent to defraud and to

induce reliance on his misrepresentation; (4) by virtue of acquaintance with JOHN R. WEBER for seven years and his interest in the property for said time, the reliance on JOHN R. WEBER'S interest to perform was justifiable; and (5) by losing a one-sixth (1/6) interest in the property by said deed, plaintiffs suffered substantial damage.

TWELFTH ISSUE

12. The twelfth issue raised is: "Whether there was any consideration paid for the deed made by Brady to Wonderwheel and Weber."

With regard to this issue, the court's decision is that no consideration was provided.

a. The court based its decision on the same facts as previously set forth herein.

b. The legal basis for the

court's decision is the same as previously set forth herein.

THIRTEENTH ISSUE

13. The thirteenth and final issue raised is: "Whether there was any basis to cancel any deeds made in favor of Weber or Wonderwheel."

With regard to this issue, the court's decision is that there is a double basis for cancellation: unjust enrichment and fraud, each being sufficient and separate basis for cancellation.

a. The court based its decision on the same facts as previously set forth herein.

b. The legal basis for the court's decision is the same as previously set forth herein.

THE JUDGEMENT

JUDGMENT is hereby ordered to be entered as follows:

1. Plaintiff ARTHUR L. BECKTOLD is entitled to partition the property by sale.

2. The property is described as indicated in the amended complaint, to wit, as A.P. No. 106-080-07, consisting of approximately 40 acres in Pine Mountain Estates near Willits, in Mendocino County.

3. Plaintiff ARTHUR L. BECKTOLD'S ownership interest in the property is determined to be an undivided three-fourths (3/4); defendant GREGORY M.L.V. WONDERWHEEL'S ownership interest is determined to be an undivided one-sixth (1/6); and defendant JOHN R. WEBER'S ownership interest is determined to be an undivided one-twelfth (1/12).

4. The division of the proceeds

from the sale of the property would be more equitable than division of the property.

5. The quitclaim deed from ANNE KAYLOR dated June 30, 1977 is hereby ordered to be reformed so as to eliminate the words "ALAN GREGORY M.L.V. WONDERWHEEL" as grantee.

6. The grant deed dated July 27, 1979 from VELDA G. BRADY to JOHN R. WEBER is hereby ordered to be cancelled.

7. The property is ordered to be sold.

8. The property shall be immediately listed with a licensed real estate broker in the Willits area. The parties shall mutually select such broker. If after 10 days, the parties cannot agree, United Farms is hereby selected to list the property until the parties mutually agree to a different broker. Said broker shall list the

property so as to bring the highest cash offer he reasonably concludes, based on market conditions and his professional judment, the property can sell for in 90 days. Defendants shall have the right of first refusal to purchase plaintiff ARTHUR L. BECKTOLD'S interest after each cash offer, provided they place in escrow a sum adequate to buy out his interest within seven (7) days of receiving notice of a cash offer acceptable to plaintiff ARTHUR L. BECKTOLD. Notice for these purposes shall be adequate if given in writing to attorney DAVID RIEMENSCHNEIDER.

9. The property shall sell for the highest cash offer acceptable to plaintiff ARTHUR L. BECKTOLD, subject to defendants' right of first refusal as set forth above.

10. The parties are restrained from committing waste; and from

interfering with the peaceful access and use of the property by a co-owner or his agent; and from interfering with the showing or sale of the property.

11. The proceeds of the sale shall be divided in accordance with the aforesaid interests after the costs of sale are paid.

12. Defendants shall pay plaintiffs the costs in this action.

13. The court retains jurisdiction over this action and the sale of the property until the property is sold and the proceeds distributed.

Dated: September 9, 1986

ARTHUR B. BROADDUS
Judge of the Superior Court

TIMOTHY O. STOEN
Attorney at Law
1889 Building
Post Office Box 1567
Ukiah, California 95482

Telephone: (707) 468-8522

Attorney for Plaintiffs

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MENDOCINO

VELDA G. BRADY, ARTHUR L. BECKTOLD, and JOSEPH BECKTOLD, Plaintiffs, versus JOHN R. WEBER and GREGORY M.L.V. WONDERWHEEL Defendants.	Case No. 50813 JUDGMENT

THIS CAUSE came on regularly for trial on February 20, 1986, and May 28, 1986, in Department 1 of the above-entitled court, the Honorable ARTHUR B. BROADDUS, Judge, presiding without a jury, and was tried on said dates. Plaintiffs appeared by their attorney

TIMOTHY O. STOEN. Defendants appeared by their attorney DAVID RIEMENSCHNEIDER. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, and the court having caused to be made and filed herein its written Statement of Decision,

IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiff ARTHUR L. BECKTOLD is entitled to partition by sale of the property which is the subject of this action ("the property"), said property being more particularly described in Exhibit A attached hereto and incorporated herein by reference.

2. The ownership interests in the property are determined to be as follows:

a. Plaintiff ARTHUR L. BECKTOLD, also known as ARTHUR BECKTOLD, is the owner of an undivided three-

fourths (3/4) interest in the property.

b. Defendant GREGORY M.L.V. WONDERWHEEL, also known as ALAN GREGORY M.L.V. WONDERWHEEL and as ALAN GREGORY CRAVENS, is the owner of an undivided one-sixth (1/6) interest in the property.

c. Defendant JOHN R. WEBER, also known as JOHN RAYMOND WEBER and as JOHN WEBER, is the owner of an undivided one-twelfth (1/12) interest in the property.

3. The division of the proceeds from the sale of the property would be more equitable than division of the property.

4. The quitclaim deed from ANNE KAYLOR dated June 30, 1977 regarding the property is hereby ordered to be reformed so as to eliminate the words "ALAN GREGORY M.L.V. WONDERWHEEL" as grantee.

5. The grant deed dated July 27, 1979 regarding the property from VELDA G.

BRADY to JOHN R. WEBER is hereby ordered to be cancelled.

6. The property is ordered to be sold.

7. The property shall be immediately listed with a licensed real estate broker in the Willits or Ukiah area. The parties shall mutually select such broker. If after 10 days, the parties cannot agree, plaintiff ARTHUR L. BECKTOLD shall designate such broker and may list the property accordingly on his signature alone. Said broker shall list the property so as to bring the highest cash offer he reasonably concludes, based on market conditions and his professional judgment, the property can sell for in 90 days. Plaintiff ARTHUR L. BECKTOLD shall have the right to accept any offer, provided, however, defendants are given the right of first refusal to buy out his interest at a 3/4 share of said offer; to

exercise this right, defendants shall place in escrow cash in the appropriate amount within seven (7) days of receiving notice of a cash offer acceptable to ARTHUR L. BECKTOLD. Notice for these purposes shall be adequate if given in writing to the law offices of attorney DAVID RIEMENSCHNEIDER.

8. The property shall sell for the highest cash offer acceptable to plaintiff ARTHUR L. BECKTOLD, subject to defendants' right of first refusal as set forth above.

9. The parties are restrained from committing waste; and from interfering with the peaceful access and use of the property by a co-owner or his agents; and from interfering with the showing or sale of the property.

10. The proceeds of the sale shall be divided in accordance with the aforesaid interests after the costs of

sale are paid.

11. Defendants shall pay plaintiffs the costs in this action which are determined to be $124.25.

12. The court retains jurisdiction over this action and the sale of the property until it is sold and the proceeds distributed.

Dated: October 21, 1986

ARTHUR B. BROADDUS
JUDGE OF THE SUPERIOR COURT

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

VELDA G. BRADY, ARTHUR L. BECKTOLD, AND JOSEPH BECKTOLD,	)	
Plaintiffs and Respondents,	)	A037353
v.	)	(Mendocino
ALAN GREGORY M.L.V. WONDERWHEEL, AND JOHN R. WEBER,	)	Co. Sup. Ct.
Defendants and Appellants.	)	No. 50813

Plaintiffs sought partition of real property located in Mendocino County. The trial court ordered the reformation of one deed, the cancellation of another, and a partition by sale, after finding defendants committed fraud in obtaining certain interests in the property. Defendants appeal, contending the trial court's findings are not supported by substantial evidence.

The judgment is affirmed.

STATEMENT OF THE FACTS

Since this appeal raises issues related to the sufficiency of evidence supporting the judgment, we will go into some detail on the facts.

The plaintiffs in this action for partition are Arthur Becktold, his brother Joseph Becktold, and their aunt, Velda Brady. Arthur Becktold is a real estate salesman from Los Angeles. Joseph Becktold collects government disability payments. He has "some psychological problems" and is dyslexic. He has a "third grade reading level."

According to plaintiffs' version of the events leading to this dispute, this story begins in 1970. At that time, Arthur Becktold asked Joseph Becktold to help him find some undeveloped land in Northern California for investment purposes.

This discussion led to a formal

agreement between the brothers. Arthur Becktold drew up an untitled one page document, dated January 6, 1971, to memorialize the agreement. Arthur Becktold agreed to provide $1,000 towards the initial purchase of a piece of property, and to make all mortgage, tax and other necessary payments. Joseph Becktold was to maintain the property, and was not to make any improvements or encumber the property in any way without Arthur Becktold's approval. In exchange for locating the property, maintaining it and complying with the other restrictions in the document, Joseph Becktold was given the right to live on the property and was to be included in Arthur Becktold's will.

The document specified that "the property is to be purchased by Joseph Becktold in [sic] behalf of Arthur L. Becktold and registered in the name of

Velda Brady."

Arthur Becktold explained the document to Joseph Becktold, and the brothers and two witnesses signed it.

Nothing came out of that agreement for approximately one year. Then, in early 1972, Joseph Becktold and some friends traveled to Mendocino County to look for land. Traveling with Joseph were Stephen and Anne Kaylor, and defendants John Weber and Alan Gregory M.L.V. Wonderwheel (a.k.a, Alan Gregory Cravens; in accord with defendants' brief, he will be referred to as Gregory Wonderwheel).

The group located and purchased, as partners, the parcel of land at the heart of this dispute.[1/] A grant deed dated March 30, 1972, conveyed one-fourth

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1/ John Weber was a "silent partner" as discussed, infra.

interests to Velda Brady and Gregory Wonderwheel, and a one-half interest to Stephen and Anne Kaylor, "husband and wife as Joint Tenants."

Joseph Becktold used $800 of the $1,000 provided by Arthur Becktold to pay for his share of the down payment. Each of the Kaylors and Wonderwheel paid in similar amounts, but Wonderwheel had to borrow $400 to $450 from the Kaylors.

The remaining amount ($13,200) of the purchase price was to be paid over ten years, in installments of $151 per month. The obligation was secured by a first deed.

Other than Joseph Becktold, none of the parties to the transaction, including Velda Brady, knew Arthur Becktold provided the money for Joseph Becktold's participation, until after this action was filed.

During the early years of ownership (1972-1977), the parties often fell behind on their payments. Arthur Becktold testified he advanced funds to keep the property from foreclosure. All monies paid by Arthur Becktold were given to Joseph Becktold as cash. Joseph Becktold had no checking or savings accounts. Joseph Becktold would give the cash to Velda Brady who would then make the payments on the property, apparently by check. Arthur Becktold claimed both the Kaylors and Gregory Wonderwheel fell approximately $2,000 behind in their payments (on the note and taxes).

At some point between 1972 and 1977, the Kaylors divorced, and Stephen quitclaimed his interest in the property to Anne. Anne Kaylor decided to sell her one-half interest. In January, 1977, she along with Joseph Becktold, Gregory Wonderwheel and John Weber met with an

attorney to discuss the buy-out. The attorney drafted an agreement, signed by Anne Kaylor, which provided "I, Anne Kaylor, . . . hereby agree to sell my entire interest [in the property] to Velda G. Brady and/or Gregory Wonderwheel, or other such persons as they direct." (Emphasis added.) The agreement specified a price of $3,600.

Ultimately, Anne Kaylor received a check for $4,500 from Velda Brady. According to the Becktolds, the purchase price also included forgiveness of the $2,000 delinquency owed by Anne Kaylor. One of the disputed points in this case is whether Gregory Wonderwheel paid any amount toward the purchase of Anne Kaylor's interest. It is undisputed he never directly paid her any money.

Gregory Wonderwheel prepared the deed for Anne Kaylor's signature. The deed gave Velda Brady and Gregory

Wonderwheel equal one-half interests in Anne Kaylor's one-half interest. The deed stated consideration of $4,500 had been paid. Gregory Wonderwheel recorded the deed on July 8, 1977.

In June, 1979, Gregory Wonderwheel granted one-third of his interest in the property (now a one-half interest) to John Weber. Gregory Wonderwheel testified that John Weber had been making payments all along. John Weber agreed with Gregory Wonderwheel's estimate of $8,000 as the amount he (Weber) had paid towards the property.

Around this same time, Gregory Wonderwheel gave Joseph Becktold a deed for Velda Brady's signature. This deed granted one-third of Velda Brady's interest to John Weber. Velda Brady signed it, and John Weber recorded it. After this last deed, Velda Brady, Gregory Wonderwheel and John Weber were

owners of record. Each owned a one-third interest.

Only John Weber consistently lived on the property. Joseph Becktold often stayed there, but clashes with John Weber caused problems. Joseph Becktold complained about John Weber firing automatic weapons on the property, his drug use, and visitors coming on the property in the middle of the night.[2/]

Gregory Wonderwheel met with Joseph Becktold and John Weber in Willits in August, 1984. Gregory Wonderwheel testified the purpose of this meeting was to discuss Joseph Becktold's complaints about John Weber, and to present Joseph Becktold's offer to buy out John Weber's interest. Gregory Wonderwheel also brought a nine-page hand-written document

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2/ Both John Weber and Gregory Wonderwheel invoked the fifth amendment when questioned regarding drugs on the property.

he had prepared, entitled "Owners' Agreement."

This document included a provision which restricted the owners from selling the property to anyone but another co-owner, and then, only at a value based on the original purchase price. The document fixed the original purchase price at $16,000. According to Gregory Wonderwheel, this written agreement merely formalized an existing "verbal" agreement. Gregory Wonderwheel presented the document to Joseph Becktold, though Joseph Becktold had never signed any legal documents in connection with the property. Joseph Becktold told Gregory Wonderwheel he would have a lawyer read him the document. Joseph Becktold never signed this document either.

Among the gaps in the evidence in this case is John Weber's and Gregory Wonderwheel's source of income during

this entire period. They both testified they had worked at odd jobs, and Gregory Wonderwheel did earn a Master's Degree in Psychology which led to employment in that field. John Weber collected some welfare. The parties never satisfactorily explained why Arthur Becktold's and John Weber's involvement was concealed. The explanation both advanced was a desire to conceal ownership from spouses. Neither Arthur Becktold nor John Weber was able to produce any records showing their payments towards the property. Gregory Wonderwheel produced some records which appeared to show payments made by John Weber. Due to health problems, Velda Brady never testified.

Arthur Becktold estimated he had contributed at least $22,750 toward the property. Gregory Wonderwheel estimated

he had contributed $7,800, John Weber $8,000, and Joseph Becktold $8,000.

PROCEDURAL HISTORY

Velda Brady filed a complaint for partition of real property (Code Civ. Proc., section 872.230.) on May 31, 1985. The complaint alleged she was the owner of an undivided one-third interest. An appraisal attached to the complaint valued the property at $140,000.[3/] The complaint prayed for partition by sale.

On July 1, 1985, Velda Brady quitclaimed her interest in the property to Arthur Becktold.

Defendants moved to compel joinder of Joseph Becktold. The parties stipulated to the granting of the motion, and the filing of an amended complaint

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3/ Defendants' appraisal valued the property at $67,500.

naming Arthur Becktold and Joseph Becktold as plaintiffs.

The amended complaint alleged Velda Brady held a one-third interest on behalf of Arthur Becktold. Further, it alleged Arthur Becktold was the true owner of an undivided three-quarters interest, including the one-third held by Velda Brady; and that Gregory Wonderwheel and John Weber each owned one-eighth interests.

Defendants answered and, as affirmative defenses, alleged estoppel and the existence of an oral agreement that gave them a "pre-emptive" right to buy a co-owner's interest for the amount invested in the property.

After hearing the testimony and receiving documentary evidence, the trial court issued a tentative decision which awarded Arthur Becktold a one-half interest and Gregory Wonderwheel a one-

half interest. The court later amended its tentative decision to award Arthur Becktold a three-quarters interest, Gregory Wonderwheel a one-sixth interest, and John Weber a one-twelfth interest.

Defendants requested a statement of decision. The trial court issued a thorough twenty-nine page statement of its factual and legal findings. The court ordered the property sold, but gave defendants a right of first refusal. The court entered judgment on November 30, 1986, and defendants appeal.

Sufficiency of Evidence

A. Introduction

This case turned on the credibility of the witnesses. Neither side produced documentary evidence which convincingly supported its arguments. The duty of this court under these circumstances is to determine whether substantial evidence supports the trial

court's findings.

"In resolving the issue of the sufficiency of the evidence, we are bound by established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment [citation]." (Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, 925.) "All issues of credibillity are likewise within the province of the trier of fact. [Citation.]" (Ibid.) "When a finding of fact is attacked on the ground that there is no substantial evidence to sustain it, the power of the appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. [Citations.]" (Green Trees Enterprises, Inc., v. Palm Springs Alpine Estates, Inc. (1967) 66 Cal.2d 782, 784, emphasis

in original.)

Defendants request this court to make factual determinations pursuant to Code of Civil Procedure section 909.[4/] In connection with this request, defendants filed a motion for leave to produce additional evidence.

The fact finding powers granted

4/ Code of Civil Procedure section 909 provides: "In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues."

appellate courts pursuant to section 909

are invoked sparingly and only in certain specified cases. (Tupman v. Haberkern (1929) 208 Cal. 256, 269.) The section "was not intended to convert the appellate tribunals of the state into triers of fact, nor to abrogate the general rule that findings of the trial court founded on substantial evidence are conclusive on appeal . . . ." (Id. at pp. 269-270.) The purpose of the section "is to enable appellate courts, in appropriate cases, to terminate litigation by affirmance, or modification and affirmance, of the judgment, or by reversal with directions to enter judgment for appellant if it appears that on no reasonable theory could respondent make a further showing in the trial court." (People v. Benford (1959) 53 Cal.2d 1,6.)

There is no need for this court to make factual determinations, nor to take

additional evidence.[5/]

B. Existence of fixed price preemptive rights

The trial court found there was no oral or written agreement among the owners or their agents requiring any owner wishing to sell his or her interest, to offer it to the other owners first. To support its finding, the court observed the following: Arthur Becktold and Joseph Becktold denied entering into such an agreement; Joseph Becktold promised not to encumber the property; Joseph Becktold's dependence and respect for his brother; the lack of a written agreement though there had been ample

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5/ The additional evidence consisted of copies of three checks, and a declaration by Gregory Wonderwheel. Respondents stipulated to admit the copies of two of the checks into the record on appeal. None of the checks, nor the declaration was material to this appeal, and the declaration is heresay. Defendants' separate motion was denied.

opportunity to draft one, particularly when Anne Kaylor sold her interest; the rejection of Gregory Wonderwheel's handwritten agreement in 1984; and, Gregory Wonderwheel's failure to present that 1984 agreement to Velda Brady when he knew she signed the legal documents affecting plaintiffs' interest in the property. In addition, the trial court determined that even if an agreement creating fixed price preemption rights had existed, such an agreement would be an invalid restraint on alienation of property under Civil Code section 711.[6/]

Defendants contend valid fixed price preemptive rights existed, and cite evidence in their favor. Both Gregory Wonderwheel and Anne Kaylor testified an oral agreement creating such rights

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6/ Civil Code section 711 provides: "Conditions restraining alienation, when repugnant to the interest created, are void."

existed. They both testified the parties bought the property for their personal enjoyment, and not for investment purposes. Anne Kaylor stated she sold her interest for the amount she had paid into the property. Gregory Wonderwheel produced three postcards purportedly written in 1976 by Joseph Becktold. Although nearly indecipherable, defendants' transcription of them reveals Joseph Becktold's disappointment over Anne Kaylor's desire to sell her interest, his belief that she could not sell her interest without the other owners' permission and apparently, his proposal that he, Gregory Wonderwheel and John Weber buy her interest.

Notwithstanding the preceding evidence indicating the existence of some sort of agreement, substantial evidence supports the trial court's finding to the

contrary.

Joseph Becktold testified he never entered into any agreement restricting the owners' rights to sell the property. The testimony of a single witness, even a party, may be sufficient to support a finding. (In re Marriage of Mix (1975) 14 Cal.3d 604, 614.) In this case, Joseph Becktold's testimony conflicted with Gregory Wonderwheel's and Anne Kaylor's. The trial court is best suited to the task of weighing their testimony and resolving the conflict. (Nestle v. City of Santa Monica, supra, 6 Cal.3d at p. 925.)

Other observations made by the trial court, discussed supra, also support the finding of no preemptive rights. In particular, the failure to mention the existence of such rights in writings contemporaneous to the sale of Anne Kaylor's interest, a sale

accomplished with the assistance of an attorney; and, Joseph Becktold's unwillingness to sign the agreement drafted by Gregory Wonderwheel in 1984.

The legal validity of fixed price preemption rights appears to be an open question. (See Miller, Fixed Price Preemptive Rights in California: The Quality of Mercer is Strained, (1980) 31 Hastings L.J. 617.) However, it is unnecessary to review the trial court's resolution of that question since the finding that there was no agreement creating such rights is supported by substantial evidence.

C. Joseph Becktold's status as owner or agent

Defendants argue that the evidence shows Joseph Becktold was the "real third partner." According to defendants, the doctrine of equitable estoppel prohibits Joseph Becktold "from contradicting his

claim to ownership in a litigation which arises from it." Alternatively, defendants assert Joseph Becktold acted as an agent with ostensible authority to bind his brother.

Since defendants failed to prove he entered into an agreement creating fixed price preemption rights, Joseph Becktold's status as an owner or agent is irrelevant. Further, defendants argument fails to show how they relied to their detriment on Joseph Becktold's alleged representations of ownership. As plaintiffs contend, defendants' argument is meaningless.

D. Lack of consideration

The trial court found lack of consideration for Gregory Wonderwheel's share of Anne Kaylor's interest and for the one-sixth interest conveyed to John Weber in 1979. The court also found "fraud was committed regarding both deeds

[to Gregory Wonderwheel and John Weber]." The court reformed the 1977 deed from Anne Kaylor to eliminate Gregory Wonderwheel as a grantee, and cancelled the 1979 deed from Velda Brady to John Weber.

Defendants, citing Civil Code sections 1614 and 1615, assert plaintiffs failed to overcome their burden of proof to show lack of consideration.[7/] Defendants suggest the trial court erroneously believed they had to prove consideration.

In their opening brief, defendants ignore the trial court's finding of fraud. However, since the trial court based its finding of fraud, in part, on

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7/ Civil Code section 1614 provides: "A written instrument is presumptive evidence of a consideration."

Civil Code section 1615 provides: "The burden of showing a want of consideration to support an instrument lies with the party seeking to invalidate or avoid it."

defendants' failure to pay consideration, defendants assertion will be examined.

First, as to the 1977 sale of Anne Kaylor's interest, it was uncontroverted that Anne Kaylor received payment from Velda Brady. The disputed issue was whether defendants reimbursed plaintiffs.

The presumption of consideration is rebuttable. (Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc. (1981) 121 Cal.App.3d 447, 456.) The evidence that defendants made no payment to the grantor, Anne Kaylor, would rebut the presumption. Given the fact, the trial court properly declared, "The burden was then on defendant Gregory Wonderwheel to prove he made payments of reimbursement to Velda G. Brady as consideration for a share of Anne Kaylor's interest . . . ." The court explicitly rejected Gregory Wonderwheel's

testimony that he reimbursed Velda Brady, expressed skepticism over his records, and concluded "Gregory Wonderwheel was engaged in attempts to take advantage of Joseph Becktold and Velda G. Brady. . ."

Although Gregory Wonderwheel appears to have made some payments to Velda Brady around the time of the sale of Anne Kaylor's interest, the trier of fact could infer those payments were for amounts past due on the promissory note or for taxes. Gregory Wonderwheel testified he was delinquent on his payments at the time Anne Kaylor sold her interest. When asked why he would send money to Velda Brady instead of paying Anne Kaylor directly, Gregory Wonderwheel's explanation was "because of convenience." There was substantial evidence to support the trial court's finding of lack of consideration in connection with the 1977 conveyance of

part of Anne Kaylor's interest to Gregory Wonderwheel.

As to the 1979 deed in which Velda Brady granted John Weber one-third of her one-half interest, the trial court relied on Joseph Becktold's testimony, along with other evidence, to find lack of consideration. Without citation to authority, defendants contend Joseph Becktold's testimony is insufficient to overcome the presumption of consideration.

Even if one accepts defendants' contention, the totality of the evidence on this question, not just that produced by plaintiffs, refuted John Weber's claim that he provided consideration. "If the presumption is wholly irreconcilable with the facts and surrounding circumstances, it has been overcome." (Kott v. Hilton (1941) 45 Cal.App.2d 548, 552.)

John Weber stated he had no proof

he made payments because "Joseph [Becktold] came to get all my records to have them duplicated, and he never brought them back a couple years ago." Questioned on his source of funds to make payments, John Weber stated that he had worked at odd jobs and had collected welfare for two years. He claimed that both Joseph Becktold and Gregory Wonderwheel loaned him the money to buy his share of Anne Kaylor's interest. As the trial court noted, "John R. Weber was vague as to the exact amount he allegedly provided." There was substantial evidence to support the trial court's finding of lack of consideration in connection with the 1979 conveyance from Velda Brady to John Weber.

E. Defendants' records

In their final "point," defendants insist the trial court erred in not relying on the records they produced as

evidence of their payments.[8/]

The record defendants principally rely on is Exhibit G. This exhibit consists of photocopies of pages from a record book maintained by a "realtor" who collected payments for the noteholder. No witness was called to authenticate Exhibit G.

The exhibit sets out the amounts paid, the dates due, the dates paid, the amounts credited to principal and interest, and the balance remaining unpaid after each payment. Next to entries with dates in 1972 through mid-1977, someone has made handwritten notations on the exhibit, designating who

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8/ In their closing brief, defendants raise several new points including a statute of limitations question that was not raised below. None of these new points appear to have any merit, and since none was raised until the closing brief, will not be considered. (Balboa Ins. Co. v. Aguirre (1983) 149 Cal.App.3d 1002, 1010.)

made the payments. Beginning with entries dated after May, 1977, the names (for example, "Gregory," "Joe" or "John") were apparently written on the papers which were copied.

Standing alone, Exhibit G proves virtually nothing. The trial court was justified in attaching little or no weight to this exhibit and in discounting Gregory Wonderwheel's explanation as to what the exhibit showed.

The other records defendants rely on, a receipt for delinquent tax payment, and receipts for some land payments, although showing Gregory Wonderwheel made some payments toward the property, do not show he was entitled to more than the one-sixth interest he was awarded.

As indicated, neither side produced reliable, convincing documentary evidence. Thus, the trial court was forced to resolve this case based on the

credibility of the witnesses. The established rules of appellate review require this court to defer to the trial court for the resolution of issues of credibility. (Nestle v. City of Santa Monica, supra, 6 Cal.3d at p.925.)

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The judgment is affirmed.

Holmdahl, J.

WE CONCUR;

Newsom, Acting PJ

Elkington, J.*

* Assigned by the Chairperson of the Judicial Council.

COURT OF APPEAL

OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION: 1

BRADY, VELDA G., ET AL.

vs.

ALAN GREGORY M.L.V. WONDERWHEEL, ET AL.

A037353

Mendocino County No. 50813

BY THE COURT:

The petition for rehearing is denied.

Dated: September 16, 1988

NEWSOM, J.
Acting P.J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 1, No. A037353
S007326

SUPREME COURT

FILED

Nov 9 1988

Clerk
DEPUTY

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

VELDA G. BRADY et al., Respondents,

v.

ALAN GREGORY M.L.V. WONDERWHEEL et al.,
Appellants.

Appellants' petition for review DENIED.

/S/ Lucas
Chief Justice

PROOF OF SERVICE BY MAIL

The undersigned Carol Spooner, acting for Petitioners herein, hereby certifies that on Friday, Feburary 3, 1989, she served the forgoing Petition for Writ of Certiorari on all parties to this appeal, by mailing copies thereof by ordinary mail, postage prepaid, addressed to their attorneys, as follows:

Three (3) copies to:

Timothy O. Stoen
Attorney at Law
601 Van Ness Ave., Suite 322
San Francisco, California 94102

Attorney for Velda G. Brady, Joseph Becktold and Authur Becktold

One (1) copy to:

Department of Justice
Office of the Attorney General
P.O. Box 944255
Sacramento, California 94244-2550

Dated February 3, 1989

/s/ Carol Spooner
Carol Spooner
72 Charles St.
Cotati, California
94931